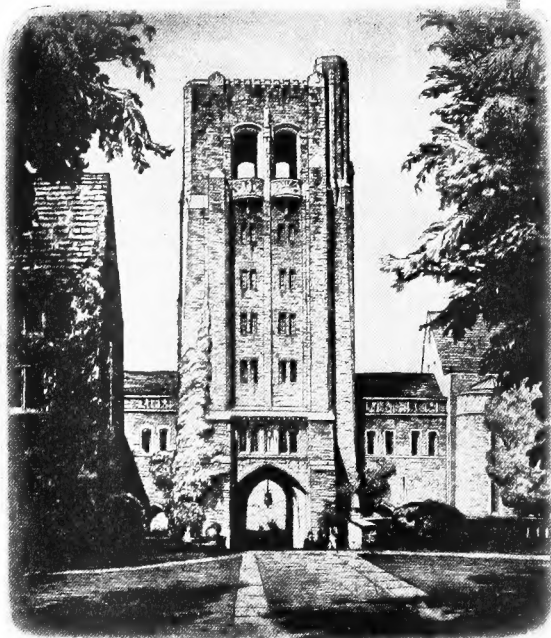


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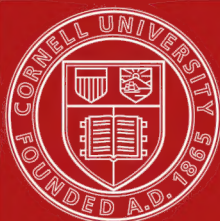


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A TREATISE
ON THE
LAW OF GARNISHMENT

Embracing Substantive Principles, Procedure and Practice, and
Garnishment as a Defense; also Conflict of Laws, and
Foreign and Domestic Exemption Statutes
as Affecting or Affected by Garnish-
ment Proceedings

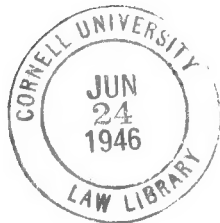
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BY
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PREFACE.

Garnishment is the most modern, and at the same time the cheapest and most effectual, remedy known to the law. While it is more especially the small creditor's remedy, it is none the less adapted to use in more important cases, and our court reports abound with cases in which judgments for many thousands of dollars have been collected by this means. For one payment that is enforced by execution, attachment, or bill in chancery, twenty are collected by garnishment. Nevertheless, there is no published text book on the subject, unless we recognize the local works on trustee process; and it is only within very recent years that compilers of digests have collected any decisions under this head.

It would be quite as logical to treat of executions in a work on attachment, or of attachment in a work on executions, as to treat of garnishment with either; for each is equally independent of the others. However, Mr. Freeman, in his work on Executions, and Judge Drake and others, in their works on Attachment, have devoted considerable space to a consideration of parts of the law of this subject, and to them the practicing lawyer is indebted for all the law of garnishment he has heretofore been able to learn from text writers. Fully half the adjudicated law of garnishment has never been touched upon by any text writer. In this

state of affairs, the lawyer who has had occasion to brief a garnishment case has been fortunate if the decisions bearing upon his case happened to be of those reviewed by any of these writers. Otherwise he had to rummage around through the digests, and find the decisions if he could. This seems to me to afford ample apology for the appearance of this treatise.

When a point of law arises in a case in hand, we want the authorities upon it. We want them all. We want them quick. The text writer who best supplies these demands most pleases us. The day of the commentator is past. This is the age of precedents. We have no time to read the fine-spun theories of the text writer who takes us on an observation excursion all over his subject in a balloon. These facts have been constantly in mind in the preparation of the present work, and it has been the one aim and effort to make a book of ready reference in which all the decisions upon any point of garnishment law and their bearings upon each other may be discovered with the least possible expenditure of time. I have usually refrained from expressing any opinion of my own, and some of the propositions of law announced, though supported by the decisions cited in support of them, might be very differently stated if I were writing the law. It is not sought herein to lay down the law, but merely to furnish a key to it which shall in a trice open to the searcher the authorities upon any branch of the subject which may interest him. To further this purpose, all devices of ready reference known to the author have been diligently employed. The work is furnished with a topical and an analytical index.

Bold-face headings and cross references have been liberally employed, and I have especially striven to arrange the matter logically, with a place for everything and everything in its place. I have given the subject my best efforts, and trust it will meet the approval of the profession and serve the purpose for which it was designed.

JOHN R. ROOD.

Dated at Marquette, Mich., March 20, 1896.

*

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Yocum v. White, 129, 135, 205, 207, 209.	Yuba, County of, v. Adams, 27.
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v. First Nat. Bank of Cairo, 49, 372.	Zanz v. Shover, 289.
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LAW OF GARNISHMENT.

CHAPTER I.

GENERAL NATURE OF THE GARNISHMENT REMEDY— SCOPE AND STATUTORY CONSTRUCTION.

- § 1. General Nature.
- 2. Ancillary to the Principal Suit.
- 3. An Action against the Garnishee.
- 4. A Proceeding at Law.
- 5. Substantially a Proceeding in Rem.
- 6. A Statutory Remedy.
- 7. General Object.
- 8. General Statutory Construction—Whether Liberal or Strict Construction.
- 9. —The Intended Remedy must be Preserved.
- 10. —Statutes cannot be Extended, nor Remedy Used Vexatiously.
- 11. —Statutes Affect the Remedy, and not the Right.
- 12. Who may Employ Garnishment Process.
- 13. In What Cases Garnishment may Issue.

General Nature.

§ 1. “Garnish” means to warn, to summon, to make aware, to notify, to attach by garnishing, to issue garnishment process.¹ The terms “garnisheed” and “garnisheeing” are corruptions, and are not used by the best writers.² Garnishment was originally a notice to a person not a party to a suit to appear in court and

¹ Black, Law Dict.; Drake, Attachm. § 451.

² Drake, Attachm. § 451, note 2; 22 Alb. Law J. 181 (1880).

explain his interest in the subject-matter of the litigation, or to furnish other information.³ Now it is the act or proceeding of attaching money or property belonging to the defendant, but in the possession of a third person, variously denominated as the "garnishee," "trustee," or "factor," according as the remedy is known as "garnishment," "factorizing," or "trustee process."⁴ Practically, garnishment is a seizure in the hands of the garnishee by notice to him,⁵ creating an effectual lien upon the garnished property to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued.⁶ It is a mode of attachment differing in no material respect from an attachment by actual levy and seizure, except in the mode of enforcement.⁷ From its original position as an appendage to an execution or attachment, garnishment has, during the past fifty years, in most of the states, become an independent remedy, capable of being directly employed in any action on contract and upon any judgment.

³ And. Law Dict.; Bouv. Law Dict.; *Mathews v. Smith*, 13 Neb. 178, 12 N. W. 825.

The term is said to have been derived from the Norman "garner," "garnisher," to warn, to summons; "garnishment," "garnissement," "garnishant," "garneyseint," warning, summons, notice. *Drake, Attachm.* § 451, note 1; *Kelham, Norman Dict.*

⁴ *Id.*

⁵ *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078.

⁶ *Western Ry. Co. v. Thornton*, 60 Ga. 306. See post, § 193.

⁷ See post, §§ 193, 194.

Ancillary to the Principal Suit.

§ 2. Garnishment is a special auxiliary remedy for the more effectual recovery of debts.⁸ It is always ancillary to the main action under which it is prosecuted,⁹ and therefore necessarily goes down with it.¹⁰ It is not a new suit,¹¹ and is necessarily before the same court as the main action.¹²

⁸ *Newland v. Circuit Judge of Wayne Co.*, 85 Mich. 155, 48 N. W. 544; *Banning v. Sibley*, 3 Minn. 389 (Gil. 282, 297); *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 398, 43 N. W. 153; *Tinsley v. Savage*, 50 Mo. 141.

⁹ *Maynards v. Cornwell*, 3 Mich. 312; *Strong v. Hollon*, 39 Mich. 411; *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 157, 41 N. W. 215; *Heritage v. Armstrong*, 101 Mich. 86, 59 N. W. 439; *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Oberteuffer v. Harwood*, 6 Fed. 828; *Pratt v. Albright*, 9 Fed. 634; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 563; *Paul v. Bird*, 25 N. J. Law, 559; *Garland v. McKittrick*, 52 Wis. 264, 9 N. W. 160.

¹⁰ *Iron Cliffs Co. v. Lahais*, 52 Mich. 397, 18 N. W. 121; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613; *Segar v. Muskegon Shingle & Lumber Co.*, 81 Mich. 345, 45 N. W. 982; *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148.

A failure to recover against all of the defendants will not dissolve the garnishment. *Bethel v. Judge of Superior Court*, 57 Mich. 381, 24 N. W. 112.

Of course, the principal suit does not go down with the garnishment, when personal service on the defendant is obtained. *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395. Under Vermont trustee action, *contra*. *Ferris v. Ferris*, 25 Vt. 100. But see *Graves v. Severens*, 37 Vt. 651, in which the trustee was never served, and the action was sustained as personal.

¹¹ *Tinsley v. Savage*, 50 Mo. 141; *Sherwood v. Stevenson*, 25 Conn. 431; *Maynards v. Cornwell*, 3 Mich. 309; *Milwaukee Bridge & Iron*

¹² *Farrington v. Sexton*, 43 Mich. 454, 5 N. W. 654. See, also, *post*, §§ 236, 326, 407.

An Action against the Garnishee.

§ 3. Although garnishment is not a new suit, but a graft or appendage to the main action, as seen in the last preceding section, yet so far as it is an adversary proceeding, and for the purpose of determining the respective rights of the parties to it, it is essentially and in effect a suit or action against the garnishee by the defendant, in the name and for the benefit of the plaintiff.¹³ Whether it is an action in such a sense that the general statutes providing for and regulat-

Works v. Wayne Circuit Judge, 73 Mich. 155, 41 N. W. 215; *Pounds v. Hamner*, 57 Ala. 342; *Barber v. Ferrill*, Id. 446; *Fechheimer v. Hays*, 11 Ind. 478; *Perea v. Colorado Nat. Bank of Texas* (N. M.) 27 Pac. 322. Contra, *Cross v. Spillman*, 93 Ala. 170, 9 South. 362.

¹³ *Caldwell v. Stewart*, 30 Iowa, 379; *McKelvey v. Crockett*, 18 Nev. 238, 2 Pac. 386; *Harris v. Phoenix Ins. Co.*, 35 Conn. 310; *Dewey v. Garvey*, 130 Mass. 86; *Cross v. Spillman*, 93 Ala. 170, 9 South. 362; *Whitman v. Keith*, 18 Ohio St. 145.

Garnishment proceedings are *res inter alios acta*, as to the defendant. *Cross v. Spillman*, 93 Ala. 170, 9 South. 362; *Edmonson v. De Kalb Co.*, 51 Ala. 104.

"The statute makes the service of a summons on a garnishee the commencement of an action against him. But it is a most peculiar action, out of the ordinary course of judicial proceedings. It is an anomaly; a statutory invention *sui generis*, with no affinity to any action known to the common law. It does not proceed on liability of the garnishee to the plaintiff, or on any privity between them. It is in effect an action brought by the plaintiff, in his own name and of his own will, in the right of the defendant in the principal suit; an action against the defendant's debtor, a stranger to the principal cause of action." *Steen v. Norton*, 45 Wis. 412.

Held that the garnishment is not an action. *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Wile v. Cohn*, 63 Fed. 759; *Wooding v. Puget Sound Nat. Bank* (Wash.) 40 Pac. 223.

ing proceedings in civil actions embrace and apply to it without express legislation to that effect, is a question which has been much litigated, and almost universally decided in the affirmative. It is agreed that it is an action in such a sense that either of the parties may avail themselves of the general statute authorizing appeals,¹⁴ or of the statute allowing amendments in civil actions,¹⁵ and it stops the running of the statute of limitations against the plaintiff.¹⁶ Likewise, when the garnishment statutes do not provide the mode of making service of process, it is held that service may be made in the manner prescribed in the general statutes for service in other actions.¹⁷ To a greater or less extent, also, the rules as to nonjoinder and misjoinder of parties,¹⁸ and the general principles of pleading and practice in civil actions, apply to garnishment proceedings.¹⁹ The plaintiff may discontinue as in other actions,²⁰ and his right to maintain suit is determined by the same rules.²¹

¹⁴ See post, § 405.

¹⁵ *Crerar v. Milwaukee & St. P. Ry. Co.*, 35 Wis. 67; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412. See, also, post, §§ 253, 267, 279, 358, 359.

¹⁶ *Fogler v. Marston*, 83 Me. 396, 22 Atl. 249.

¹⁷ *Jones v. New York & E. Ry. Co.*, 1 Grant, Cas. (Pa.) 457. See, also, post, § 273. *Contra*, *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155, 41 N. W. 215.

¹⁸ See post, §§ 261, 263, 369.

¹⁹ See post, chapters on "Formation and Trial of the Issue"; also, on "Judgment," "Costs," and "Appeals."

²⁰ *Greil v. Loftin*, 65 Ala. 591.

²¹ See post, §§ 44-48.

Held that, when "no suit must be commenced against an administrator as such until six months after the grant of letters of

A Proceeding at Law.

§ 4. Garnishment is generally considered as a legal as distinguished from an equitable proceeding, and ordinarily equitable rights cannot be reached by this process,²² nor can a court of equity be invoked to aid the proceedings under it.²³

Substantially a Proceeding in Rem.

§ 5. It is a proceeding by which the debtor is compelled to pay another than his creditor, and the right

administration," the administrator cannot be garnished within that time. *Moore v. Stainton*, 22 Ala. 831.

It has been held that, although the federal court has jurisdiction of the main action, it cannot entertain garnishment in aid thereof, when the parties to that proceeding are residents of the same state. *Tunstall v. Worthington*, Hempst. 662, Fed. Cas. No. 14,239. But the correctness of this decision may well be doubted. *Pratt v. Albright*, 9 Fed. 639; *Kidderlin v. Meyer*, 2 Miles (Pa.) 292.

The statute, speaking of "the defendant in the action," who is doing or threatens to do some act in violation of the plaintiff's rights, and who may be restrained, includes the garnishee. *Malley v. Altman*, 14 Wis. 24; *Almy v. Platt*, 16 Wis. 169.

FOR FURTHER AUTHORITY upon the general question of garnishment as an action, the reader is referred to *Delacroix v. Hart*, 24 La. Ann. 141; *Thorn v. Woodruff*, 5 Ark. 55; *Atchinson v. Rosalip*, 3 Pin. (Wis.) 288, 4 Chand. 12; *Lusk v. Galloway*, 52 Wis. 164, 8 N. W. 608; *Mygatt v. Burton*, 74 Wis. 352, 43 N. W. 100; *Bragg v. Gaynor*, 85 Wis. 481, 55 N. W. 923; *State v. Cordes*, 87 Wis. 373, 58 N. W. 771; *Gorman v. Swaggerty*, 1 Sneed (Tenn.) 560; *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Pollock v. Jones*, 96 Ala. 492, 11 South. 529; *Heyward v. Phillips-Buttoff Manuf'g Co.*, 97 Ala. 533, 11 South. 837; *First Nat. Bank of Gadsden v. Dunn*, 102 Ala. 204, 14 South. 559; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398.

²² See post, §§ 153, 154.

²³ See post, § 187.

of the creditor is, against his will, transferred to another.²⁴ It is in the nature of a proceeding in rem,²⁵ and the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it.²⁶

To all parties to the suit, and their privies, it is a proceeding in rem; and, if the court have jurisdiction, its judgment is conclusive, the same as any judgment

²⁴ *Wells v. American Exp. Co.*, 55 Wis. 23, 34, 11 N. W. 537; *Ettelsohn v. Fireman's Fund. Ins. Co.*, 64 Mich. 334, 31 N. W. 201; *Newland v. Circuit Judge*, 85 Mich. 151, 48 N. W. 544; *Strong v. Smith*, 1 Metc. (Mass.) 476; *Mayor & Aldermen of City of London v. London Joint-Stock Bank*, 50 L. J. (Q. B.) 594.

²⁵ *Steen v. Norton*, 45 Wis. 412; *Wells v. American Exp. Co.*, 55 Wis. 23, 34, 11 N. W. 537; *Moore v. Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Daniels v. Clark*, 38 Iowa, 556; *Sears v. Thompson*, 72 Iowa, 61, 33 N. W. 364; *Gage v. Maschmeyer*, 72 Iowa, 696, 34 N. W. 482; *Timm v. Stegman*, 6 Wash. 13, 32 Pac. 1004; *Harvey v. Great Northern Ry. Co.* 50 Minn. 405, 52 N. W. 905; *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392; *McBride v. Protection Ins. Co.*, 22 Conn. 257; *Cousens v. Lovejoy*, 81 Me. 467, 17 Atl. 495; *State v. Duncan*, 37 Neb. 631, 56 N. W. 216; *Christmas v. Biddle*, 13 Pa. St. 223; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978; *Myers v. Smith*, 29 Ohio St. 120; *Wile v. Cohn*, 63 Fed. 759; *McCarty v. Steam Propeller The City of New Bedford*, 4 Fed. 819.

Failure to get jurisdiction of the res will not, as in a proceeding in rem, defeat the action, when personal service is had on the defendant, and he may be recovered against personally. *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395.

²⁶ See post, § 193.

IN REM ET IN PERSONAM: "It is true that the attachment process is a proceeding in rem, but it is equally true that it is something more. It is also a proceeding against the garnishee personally for the purpose of compelling him to answer for the value where the thing itself is not produced. * * * His own estate may be taken in execution if he fails to answer interrogatories, or to procure the goods and effects of the defendant found in his hands or possession, or neglect to pay the debt attached, if the same be due and payable." *Childs v. Digby*, 24 Pa. St. 23; *Barton v. Spencer* (Okl.) 41 Pac. 605. See, also, post, §§ 391, 392, 402, 193.

in rem.²⁷ A proceeding purely in rem is not inter partes upon the record, but appears to be directly against the property, and notice is given to all the world to defend. In these matters it differs from garnishment.²⁸

A Statutory Remedy.

§ 6. Foreign attachment by the particular custom of London, and other similar remedies kindred to the process of garnishment as it exists in this country to-day, though restricted in operation and under various proceedings, are probably of ancient origin.²⁹ But the remedy, as it obtains in the United States, is held to be in derogation of common law, and purely statutory and special.³⁰ As there is no other authority for the proceeding, the plaintiff must follow the stat-

²⁷ Moore v. Chicago, R. I. & P. R. Co., 43 Iowa, 385.

²⁸ Woodruff v. Taylor, 20 Vt. 65.

²⁹ Drake, Attachm. §§ 1-4.

³⁰ Sievers v. Woodburn-Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311; Ford v. Detroit Dry-Dock Co., 50 Mich. 358, 15 N. W. 509; Iron Cliffs Co. v. Lahais, 52 Mich. 394, 18 N. W. 121; Folkerts v. Standish, 55 Mich. 467, 21 N. W. 891; Hanselman v. Kegel, 60 Mich. 548, 27 N. W. 678; Lyon v. Ballentine, 63 Mich. 105, 29 N. W. 837; Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 334, 31 N. W. 201; Milwaukee Bridge & Iron Works v. Circuit Judge, 73 Mich. 157, 41 N. W. 215; Shafer Iron Co. v. Stone, Circuit Judge, 88 Mich. 472, 50 N. W. 389; Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050; Rindge v. Green, 52 Vt. 204, 209; Hall v. Bowker, 44 Vt. 77; Wells v. American Exp. Co., 55 Wis. 23, 31, 11 N. W. 537; McDonald v. Vinette, 58 Wis. 619, 17 N. W. 319; State v. Duncan, 37 Neb. 631, 56 N. W. 216; Roberts v. Laudecker, 9 Cal. 262; Raymond v. Narragansett Tinware Co., 14 R. I. 310; King v. Payan, 18 Ark. 583; Cariker v. Anderson, 27 Ill. 358; May v. Baker, 15 Ill. 89; Curtis v. Steever, 36 N. J. Law, 304; Carper v. Richards, 13 Ohio St. 222; Porter & Blair Hardware Co. v. Perdue

ute strictly,³¹ and the garnishee cannot safely waive compliance with any of its substantial requirements,³² or submit to a judgment in an unauthorized garnish-

(Ala.) 16 South. 713; *Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617.

A HISTORY of the rise of the garnishment action in America is given in a note by Chancellor Kent, 2 Kent, Comm. 403.

CUSTOM OF LONDON: "We are not bound or required by our statute adopting the common law of England to enforce local customs and statutes as a rule of action in this state. On the contrary, they are excluded. The proceeding by foreign attachment was unknown to the common law. It, by local custom, existed in London, Exeter, and may have existed in some other places. 1 Rolle, Abr. 552; 1 Com. Dig. 580. It was a local custom, and wholly governed by the special custom. As our legislature in no wise refers to it in adopting our earliest attachment law, or subsequent amendments or revisions, we have no ground to suppose that body had those customs in mind, or could have intended them to have any bearing, in giving these acts construction." *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Pennsylvania Steel Co. v. New Jersey S. R. Co.*, 4 Houst. (Del.) 572; *Walsh v. Blackwell*, 14 N. J. Law, 344; *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4,816. CONTRA: "The doctrine of garnishment is part of the common law, derived from the custom of London; and, although it is here partially regulated by statute, it is not the less a common-law proceeding." *Cahoon v. Levy*, 5 Cal. 294, 65 Am. Dec. 515.

³¹ *Townsend v. Circuit Judge*, 39 Mich. 407; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121; *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. 278; *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. 641; *Landsberg v. Bullock*, 79 Mich. 278, 44 N. W. 608; *Smith v. Holland*, 81 Mich. 476, 45 N. W. 1017; *Peninsular Stove Co. v. Circuit Judge*, 85 Mich. 400, 48 N. W. 549; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Ferris v. Ferris*, 25 Vt. 100; *Cariker v. Anderson*, 27 Ill. 358; *Gibbon v. Bryan*, 3 Ill. App. 298; *Timm v. Stegman*, 6 Wash. 13, 32 Pac. 1004; *Heritage v. Armstrong*, 101 Mich. 85, 59 N. W. 439; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398; *Wells v. American Exp. Co.*, 55 Wis. 34, 11 N. W.

³² *Hebel v. Amazon Ins. Co.*, 33 Mich. 402; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050; post, § 213.

ment,³³ because others may have an interest in the result quite equal with those of the parties to the suit.³⁴

General Object.

§ 7. Some of the early statutes seem to have been intended only to aid the plaintiff in getting service, as the defendant could dissolve the garnishment by giving mere appearance bail.³⁵ But the majority, even of these, arose from the obvious necessity of some mode to recover debts from absent persons having property or credits within the state,³⁶ and a purpose to make property consisting of debts and other effects not within the reach of ordinary process equally available with other property to creditors of the owner,³⁷ so far as that object might be accomplished without

537; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548; *McDonald v. Vinette*, 58 Wis. 619, 17 N. W. 319; *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46; *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857; *Garland v. Sperling* (N. M.) 30 Pac. 925; *Roberts v. Landecker*, 9 Cal. 262; *Heyward v. Phillips-Buttoff Manuf'g Co.*, 97 Ala. 533, 11 South. 837; *State v. Duncan*, 37 Neb. 631, 56 N. W. 216; *McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526; *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298; *Willis v. Lyman*, 22 Tex. 270; *Scurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478, 14 S. W. 148; *Booth v. Denike*, 65 Fed. 43. But see *Davis v. Mahany*, 38 N. J. Law, 104; *Carter v. Koshland*, 13 Or. 615, 12 Pac. 58.

³³ *Whitcomb v. Atkins*, 40 Neb. 549, 59 N. W. 86.

³⁴ *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 334, 31 N. W. 201.

³⁵ *Jackson's Appeal*, 2 Grant (Pa.) 407; *Risewick v. Davis*, 19 Md. 83; *Albert v. Albert*, 78 Md. 338, 28 Atl. 388.

³⁶ *Campbell v. Morris*, 3 Har. & McH. (Md.) 535, 567; *Hepburn's Case*, 3 Bland (Md.) 95, 119; *Barnet's Case*, 1 Dall. (U. S.) 152; *Strong v. Barlow*, Kirby (Conn.) 376.

³⁷ *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33; *Bray v. Wallingford*, 20 Conn. 416; *New Haven Steam Sawmill Co. v.*

too serious invasion of the rights of third persons,³⁸ and in many cases to supplant the old creditor's bill in equity with a cheaper and more speedy remedy at law.³⁹ But, as appears by allowing the use of the remedy at the commencement of suit in all actions founded upon contract, and by otherwise extending it, many modern statutes have absorbed all these in the paramount purpose to secure to the plaintiff satisfaction of whatever judgment he may recover in his suit;⁴⁰ and herein the advantage of the process is most apparent, in enabling creditors, at the very commencement of their suit against the principal debtor, to seize upon his property without warning, and thus obtain security which would be far enough beyond their reach at the termination of the action.⁴¹

Fowler, 28 Conn. 103; Flagg v. Platt, 32 Conn. 216; Taylor v. Burlington & M. R. R. Co., 5 Iowa, 114, 123; Banning v. Sibley, 3 Minn. 389 (Gil. 282, 297); President, etc., Union Turnpike Road v. Jenkins, 2 Mass. 37; La Crosse Nat. Bank v. Wilson, 74 Wis. 398, 43 N. W. 153; Hicks v. Gleason, 20 Vt. 139; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. 386, 3 Am. & Eng. Corp. Cas. 105; Wilder v. Weatherhead, 32 Vt. 765; Drake, Attachm. § 451.

³⁸ Karp v. Citizens' Nat. Bank, 76 Mich. 681, 43 N. W. 680.

³⁹ La Crosse Nat. Bank v. Wilson, 74 Wis. 398, 43 N. W. 153; Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857.

Held, that the garnishee cannot refuse to answer on the ground that the proceedings are prosecuted merely for the purpose of discovery. Oberteuffer v. Harwood, 6 Fed. 828. Garnishment is a method of seizure, and not a bill of discovery. State Nat. Bank v. Boatner, 39 La. Ann. 843, 2 South. 589.

⁴⁰ Suydam v. Huggeford, 23 Pick. 465, 470; Beamer v. Winter, 41 Kan. 596, 21 Pac. 1078; Kennedy v. Tiernay, 14 R. I. 528; Bethel v. Judge of Superior Court, 57 Mich. 381, 24 N. W. 112; Newland v. Circuit Judge, 85 Mich. 151, 48 N. W. 544; Sears v. Thompson, 72 Iowa, 61, 33 N. W. 364; Oberteuffer v. Harwood, 6 Fed. 828.

⁴¹ Banning v. Sibley, 3 Minn. 389 (Gil. 282, 295).

General Statutory Construction.

Whether Liberal or Strict Construction.

§ 8. It is generally held that garnishment statutes, being remedial, should be liberally construed.⁴² In some of the states, garnishment is considered as a harsh and peculiar remedy,⁴³ which cannot be aided by presumptions,⁴⁴ and is unsupported by such equitable considerations as appeal to the conscience of the court;⁴⁵ and it is held that statutes providing the remedy must be strictly construed, because in derogation of common law.⁴⁶

⁴² *Enos v. Tuttle*, 3 Conn. 29; *Starr v. Carrington*, Id. 284; *Fitch v. Waite*, 5 Conn. 117, 122; *Treadway v. Andrews*, 20 Conn. 384; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Woodward v. Woodward*, 9 N. J. Law, 115, 17 Am. Dec. 462; *Davis v. Mahany*, 38 N. J. Law, 104, 108; *Luton v. Hoehn*, 72 Ill. 81; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Lyman v. Wood*, 42 Vt. 113; *White v. Simpson* (Ala.) 18 South. 151; *Whitney v. Munroe*, 19 Me. 42, 36 Am. Dec. 732.

"This is a remedial law, and ought, upon the soundest principles of construction, to be so extended as to remove the mischief and to advance the remedy." *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4,816.

⁴³ *Sievers v. Woodburn-Sarven Wheel Co.*, 43 Mich. 277, 5 N. W. 311; *Weimeister v. Manville*, 44 Mich. 409, 6 N. W. 879; *Rothschild v. Burton*, 57 Mich. 544, 25 N. W. 49; *Iron Cliffs Co. v. Lahais*, 52 Mich. 396, 18 N. W. 121; *Farwell v. Chambers*, 62 Mich. 321, 28 N. W. 859.

⁴⁴ *Weimeister v. Manville*, 44 Mich. 408, 6 N. W. 859; *Folkerts v. Standish*, 55 Mich. 467, 21 N. W. 891; *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 334, 31 N. W. 201.

⁴⁵ *Farwell v. Chambers*, 62 Mich. 321, 28 N. W. 859.

⁴⁶ *Ford v. Detroit Dry-Dock Co.*, 50 Mich. 358, 15 N. W. 509; *Maynards v. Cornwell*, 3 Mich. 312; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121; *Folkerts v. Standish*, 55 Mich. 467, 21 N. W. 891; *Hanselman v. Kegel*, 60 Mich. 548, 27 N. W. 678; *Far-*

The Intended Remedy must be Preserved.

§ 9. But even in these states it is held that the proceeding should be governed by equitable principles, to the end that the intent of the legislature may be carried out,⁴⁷ and it is the duty of the court to sustain the law, and preserve the remedy designed by the legislature, if there appears any way in which it can be made effectual.⁴⁸

Statutes cannot be Extended, nor Remedy used Vexatiously.

§ 10. As the proceedings are not in the ordinary course of common law, involve consequences that could not otherwise arise at law or in equity,⁴⁹ often compel the garnishee to submit to the expense and vexation of a suit in which he has no interest, and which he might be saved but for the garnishment,⁵⁰ it ought not to be resorted to without sufficient reasons, or when the redress sought may be obtained through common-law

well v. Chambers, 62 Mich. 316, 28 N. W. 859; Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 334, 31 N. W. 201; Perea v. Colorado Nat. Bank (N. M.) 27 Pac. 322; Scurlock v. Gulf, C. & S. F. Ry. Co., 77 Tex. 478, 14 S. W. 148; Gause v. Cone, 73 Tex. 239, 11 S. W. 162; Jemison v. Scarborough, 56 Tex. 360.

⁴⁷ Lyon v. Ballentine, 63 Mich. 104, 29 N. W. 837; Marx v. Parker, 9 Wash. 473, 37 Pac. 677; Roberts v. Landecker, 9 Cal. 266.

Garnishment statutes, being in *pari materia*, will be construed together, to carry out the intent of the legislature. Storm v. Cotzhausen, 38 Wis. 145; City of Denver v. Brown, 11 Colo. 337, 18 Pac. 214; Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000.

⁴⁸ Bethel v. Linn, 63 Mich. 472, 30 N. W. 84; Perea v. Colorado Nat. Bank (N. M.) 27 Pac. 322; Carter v. Koshland, 13 Or. 615, 12 Pac. 58; Pomeroy v. Rand, McNally & Co. (Ill.) 41 N. E. 636.

⁴⁹ Blake v. Hubbard, 45 Mich. 1, 7 N. W. 204.

⁵⁰ Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 334, 31 N. W. 201; Rothschild v. Burton, 57 Mich. 544, 25 N. W. 49.

proceedings,⁵¹ and the statute cannot be extended by construction to include cases not clearly provided for,⁵² nor to supply defects in the method of enforcement.⁵³

Statutes Affect the Remedy, and not the Right.

§ 11. Inasmuch as garnishment statutes create no new rights or liabilities, and are purely remedial, they are not retroactive when applied to suits commenced after passage of the act, though relating to former transactions.⁵⁴ A person does not, by commencement of suit under them, acquire a vested right to pursue the statutory remedy, and therefore the legislature may deprive the plaintiff of the benefits of his garnishment by changing or repealing the law at any time before

⁵¹ *Weimeister v. Manville*, 44 Mich. 408, 6 N. W. 859; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121; *Orton v. Noonan*, 27 Wis. 581; *Chanute v. Martin*, 25 Ill. 49; *Kruse v. Wilson*, 79 Ill. 233.

To sustain garnishment, it is not necessary to show that the defendant has no property subject to attachment, when the statute does not require it. *Davis v. Wilson*, 52 Iowa, 187, 3 N. W. 52.

When an affidavit that defendant has no property subject to execution is a condition precedent to the right to garnish, the solvent defendant may move to dismiss the garnishment as an abuse of process. *German-American Bank v. Butler-Mueller Co.*, 87 Wis. 467, 58 N. W. 746.

⁵² See post, § 13; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Perea v. Colorado Nat. Bank (N. M.)* 27 Pac. 322; *Picquet v. Swan*, 4 Mason, 443, Fed. Cas. No. 11,133.

⁵³ *Aldis v. Hull*, 1 D. Chip. (Vt.) 314; *Baynard v. Simmons*, 5 El. & Bl. 58, 61, 85 E. C. L. 59.

⁵⁴ *Heineman v. Schloss*, 83 Mich. 153, 47 N. W. 107; *Klaus v. City of Green Bay*, 34 Wis. 628; *Fisher v. Hervey*, 6 Colo. 16; *Bingham v. Rushing*, 5 Ala. 403; *Paschall v. Whitsett*, 11 Ala. 472. But see *Hartle v. Long*, 5 Pa. St. 491.

he has reduced it to judgment.⁵⁵ A statute exempting property from garnishment held not applicable to garnishment instituted before laws took effect, because such application of the statute would impair the obligation of contracts.* The garnishment statutes do not impair the obligation of contracts, nor deprive the defendant of his property without due process of law.⁵⁶

Who may Employ Garnishment Process.

§ 12. Unless the remedy is limited by special statute,⁵⁷ or excluded by contract between the parties,⁵⁸ it may be invoked in cases within the purview of the statute by the United States,⁵⁹ or by any of the states,⁶⁰ or by an assignee of the chose in action on which the suit is brought,⁶¹ or by a nonresident of the state,⁶² though the defendant is also a nonresident, and only substituted service is obtained upon him in the main action,⁶³ or by one who has proved his account under a

⁵⁵ *Freiberg v. Singer*, 90 Wis. 608, 63 N. W. 754.

* *Willard v. Sturm* (Iowa), 65 N. W. 847.

⁵⁶ *Cross v. Brown* (R. I.) 33 Atl. 147, 151.

⁵⁷ *Yerby v. Lackland*, 6 Har. & J. (Md.) 446; *Giddens v. Williamson*, 65 Ala. 439.

⁵⁸ *Turner v. Burnell*, 48 Wis. 221, 4 N. W. 30.

⁵⁹ *U. S. v. Graff*, 67 Barb. (N. Y.) 304.

⁶⁰ *People v. Johnson*, 14 Ill. 342.

⁶¹ *Crippen v. Fletcher*, 56 Mich. 388, 23 N. W. 56; *Whitman v. Keith*, 18 Ohio St. 143.

⁶² *Ward v. Morrison*, 25 Vt. 598; *Wootney v. Shirley*, Min. (Ala.) 14; *Burrows v. Dumphy*, 2 Har. (Del.) 308.

⁶³ *Newland v. Circuit Judge*, 85 Mich. 151, 48 N. W. 544; *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663; *Cross v. Brown* (R. I.) 33 Atl. 154. *Contra*, *Webb v. Lea*, 6 Yerg. (Tenn.) 473.

fraudulent assignment to garnishee as trustee for the benefit of creditors of the defendant,⁶⁴ or in an action against a corporation,⁶⁵ or by a plaintiff who has other security, or is prosecuting another remedy;⁶⁶ in short, by any person not denied the remedy by the statute itself or by estoppel.

In What Cases Garnishment may Issue.

§ 13. As the proceedings are purely statutory, and cannot be extended to cases unprovided for without mischief,⁶⁷ the courts have no discretion to enlarge the remedy,⁶⁸ or hold under it either persons⁶⁹ or property⁷⁰ not made subject to the process. Writs of gar-

⁶⁴ Neufelder v. German-American Ins. Co., 6 Wash. 336, 33 Pac. 870; Thomas v. Brown, 67 Md. 512, 10 Atl. 713; Crippen v. Fletcher, 56 Mich. 388, 23 N. W. 56; Black v. Dawson, 82 Mich. 485, 46 N. W. 793.

Held, that the plaintiff in garnishment does not waive his lien by procuring an allowance of his claim in full, as unsecured, before the commissioners of the debtor's insolvent estate. Lawrence v. Security Co., 56 Conn. 423, 15 Atl. 406.

⁶⁵ Everdell v. Sheboygan & F. R. Co., 41 Wis. 402.

⁶⁶ See, post, § 185.

⁶⁷ Sievers v. Woodburn-Sarven Wheel Co., 43 Mich. 277, 5 N. W. 311; Boyer v. Hawkins, 86 Iowa, 40, 52 N. W. 659.

⁶⁸ Fearey v. Cummings, 41 Mich. 384, 1 N. W. 946; Atchinson v. Rosalip, 4 Chand. (Wis.) 12, 17, 3 Pin. 288.

⁶⁹ Hewitt v. Wagar Lumber Co., 38 Mich. 702. "Any person" held to include partnership. Whitman v. Keith, 18 Ohio St. 144.

⁷⁰ Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; Markham v. Gehan, 42 Mich. 74, 3 N. W. 262; Ford v. Detroit Dry-Dock Co., 50 Mich. 358, 15 N. W. 509; Folkerts v. Standish, 55 Mich. 463, 21 N. W. 891; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859; Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050; Gause v. Cone, 73 Tex. 239, 11 S. W. 162; Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000.

nishment can issue only in the cases enumerated in the statute.⁷¹ To entitle the plaintiff to the benefit he claims, he must show that his case is one clearly contemplated by the statute,⁷² for the remedy cannot be extended to doubtful cases.⁷³ Garnishment cannot be employed to secure payment of the garnishment judgment, unless specially so provided by statute.⁷⁴ Upon grounds of public policy, neither the property of municipal corporations used for municipal purposes nor their revenues can be sequestered by garnishment in actions against them.⁷⁵ It has been held

⁷¹ *Weimeister v. Manville*, 44 Mich. 409, 6 N. W. 859; *Weimeister v. Singer*, 44 Mich. 406, 6 N. W. 858; *Wilson v. Circuit Judge*, 82 Mich. 169, 46 N. W. 439; *Graves v. Severens*, 37 Vt. 651; *Ferris v. Ferris*, 25 Vt. 100; *Rindge v. Green*, 52 Vt. 209; *Porter & Blair Hardware Co. v. Perdue* (Ala.) 16 South. 713; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Gilcreest v. Savage*, 44 Ill. 56; *Bliss v. Smith*, 78 Ill. 359.

⁷² *Iron Cliffs Co. v. Lahais*, 52 Mich. 396, 18 N. W. 121; *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. 641; *Gowan v. Hanson*, 55 Wis. 345, 13 N. W. 238; *Webster v. Steel*, 75 Ill. 544; *Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617.

⁷³ *Folkerts v. Standish*, 55 Mich. 466, 21 N. W. 891; *Farwell v. Chambers*, 62 Mich. 321, 28 N. W. 809. But see *Field v. Haines*, 28 Fed. 919.

In United States courts, any remedy may be employed which is available in a like case in the courts of the state. *Sage v. St. Paul, S. & T. F. Ry. Co.*, 47 Fed. 3.

⁷⁴ *Illinois Cent. Ry. Co. v. Weaver*, 54 Ill. 319; *Wolf v. Tappan*, 5 Dana (Ky.) 361. Compare *Jones v. Huntington*, 9 Mo. 249; *Squair v. Shea*, 26 Ohio St. 645. Contra, *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204.

⁷⁵ *Egerton v. Third Municipality*, 1 La. Ann. 435; *Moore v. Mayor*, etc., of Chattanooga, 8 Heisk. (Tenn.) 850; *Underhill v. Calhoun*, 63 Ala. 216; *Hitchcock v. Galveston Wharf Co.*, 50 Fed. 263. Contra, *Smoot v. Hart*, 33 Ala. 69.

When land owned by a city, but not used for municipal purposes, is sold, and the money derived from the sale is deposited in a bank,

that judgments against deceased persons cannot be enforced by garnishment proceedings.⁷⁶ The same has been held of proceedings against the estate of a ward under guardianship,⁷⁷ and of a suit against an administrator for a debt of the decedent.⁷⁸ When it appears that process has been improvidently issued, it is the duty of the court to dismiss the same at any stage of the proceedings when the fact is discovered.⁷⁹

the bank may be charged as the garnishee of the city therefor. These funds are not exempt from garnishment as public revenues. *Murphree v. City of Mobile* (Ala.) 18 South. 740.

⁷⁶ *McCoombe v. Dunch*, 2 Dall. 73; *Peacock v. Wildes*, 8 N. J. Law, 179.

⁷⁷ *Homstead v. Loomis*, 53 Me. 549.

⁷⁸ *Bryant v. Fussel*, 11 R. I. 286; *Boyden v. Ward*, 38 Vt. 628. Contra, *Harmon v. Osgood*, 151 Mass. 501, 24 N. E. 401.

⁷⁹ *Chanute v. Martin*, 25 Ill. 49.

CHAPTER II.

WHO MAY BE MADE A GARNISHEE.

- § 14. Grounds of Exemption—Practice.
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The Reason Limits the Rule.
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- 34. — And for Balances after Litigation is Concluded.
- 35. — Limitation Applies to Administrators, Executors, Sheriffs,
etc.
- 36. Attorneys at Law.
- 37. Common Carriers.
- 38. Infants, Lunatics, and Married Women.
- 39. Plaintiffs.
- 40. Defendants.
- 41. Husband or Wife of Defendant.
- 42. Officers and Agents of Defendant Corporations—Not Garnish-
able in Suits against Corporations.
- 43. — Contra.

Grounds of Exemption—Practice.

§ 14. The broad language of most of the garnishment statutes would indicate that "any person" may be charged as a garnishee, but courts have been frequently asked to determine whether the legislature did not intend a much more restricted application of the statute than its language would imply. The principal grounds upon which these contentions have been based are considerations of public policy, the construction of the terms of the statute, the peculiar relations which the person sought to be charged sustains to the general public or to one of the parties to the action, his disability to be sued, and the power of the court to bind him by its process.¹ When one not amenable to garnishment is summoned, he should be discharged upon motion without answer.² The application for dismissal must be made to the court into which the garnishee is summoned, and the court whose officer he is will not proceed by contempt to punish the garnishing creditor.³ These various classes of cases we will proceed to consider.

Nonresidents.

§ 15. A nonresident of London could not be held as garnishee under the special custom of London;⁴ and

¹ To the effect that the intent of the legislature is not necessarily found in the plain terms of the statute, see *Staniels v. Raymond*, 4 Cush. 314; *Town of Ryegate v. Town of Wardsboro*, 30 Vt. 746.

² *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204; *Lord v. Meachem*, 32 Minn. 66, 19 N. W. 346.

³ *Ex parte Schulenburg*, 25 Fed. 211.

⁴ 1 Saund. 67, note a; *Tamm v. Williams*, 2 Chit. 438; 3 Doug. 281;

the English rule seems to have been followed by the courts of the New England states and some others.⁵ Generally, this holding seems to be on the ground that the situs of the debt owed by the garnishee does not migrate with him wherever he may go, but remains continually at the domicile of the defendant, unless made payable at some other place; and, therefore, that, in case the defendant is a nonresident, the court acquires no jurisdiction of the property by service of the summons on the garnishee within the state, though it thereby acquires jurisdiction of the person of the garnishee.⁶ Therefore the same courts hold that where such nonresident served as garnishee has the defendant's property in his possession within the

Crosby v. Hetherington, 4 Man. & G. 933; Day v. Paupierre, 7 Dowl. & L. 12; 13 Adol. & E. (N. S.) 802.

⁵ Tingley v. Bateman, 10 Mass. 343; Ray v. Underwood, 3 Pick. 302; Hart v. Anthony, 15 Pick. 445; Nye v. Liscombe, 21 Pick. 264; Allen v. Wright, 134 Mass. 347; Young v. Ross, 11 Fost. (N. H.) 201; Sawyer v. Thompson, 24 N. H. 510; Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183; Baxter v. Vincent, 6 Vt. 614; Rindge v. Green, 52 Vt. 204; Craig v. Gunn, 67 Vt. 92, 30 Atl. 860; Cronin v. Foster, 13 R. I. 196; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Green v. Farmers' & Citizens' Bank, 25 Conn. 452; Willet v. Equitable Ins. Co., 10 Abb. Prac. 193; Miller v. Hooe, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573; Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N. W. 788; Peters v. Rogers, 5 Mason, 555, Fed. Cas. No. 1,033.

⁶ Lawrence v. Smith, 45 N. H. 533; Illinois Cent. Ry. Co. v. Smith, 70 Miss. 344, 12 South. 461; Louisville & N. Ry. Co. v. Dooley, 78 Ala. 524; Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746; Wright v. Chicago, B. & Q. Ry. Co., 19 Neb. 175, 27 N. W. 90, 94; Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co., 45 Wis. 172; Renier v. Hurlbut, 81 Wis. 24, 50 N. W. 783. Contra, Allen v. Wright, 134 Mass. 349. See, also, cases cited under note 5, above.

state,⁷ or is bound to pay or deliver to him within the jurisdiction,⁸ or a part of several joint garnishees are residents of the state, they may be held as garnishees.⁹ But other states hold that a nonresident may be charged as garnishee though defendant is a nonresident and the debt is made payable out of the state.¹⁰

Private Corporations.

Domestic.

§ 16. It has frequently been contended that the terms "any person" refer only to natural persons, and, therefore, that corporations are not liable to be made garnishees unless the statute particularly states that they shall be; but it has been generally held that corporations are liable to the process, though not specially mentioned in the statute.¹¹ But service of process upon the officers and parties in interest in a prospective corporation before its charter is granted has been

⁷ *Young v. Ross*, 31 N. H. 201; *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662; *Cassity v. Cota*, 54 Me. 380; *Marqueze v. Le Blanc*, 29 La. Ann. 194.

⁸ *Jones v. Winchester*, 6 N. H. 497; *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 179.

⁹ *Parker v. Danforth*, 16 Mass. 299; *Peck v. Barnum*, 24 Vt. 75.

¹⁰ *Morgan v. Neville*, 74 Pa. St. 52; *Burlington & M. R. Ry. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622. See, also, post, § 242.

¹¹ *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 416, 421; *Taylor v. Burlington & M. R. Ry. Co.*, 5 Iowa, 114, 123; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Mineral Point Ry. Co. v. Keep*, 22 Ill. 9, 18, 74 Am. Dec. 124. Contra, *Hewitt v. Wagar Lumber Co.*, 38 Mich. 701.

Corporations held not liable to be held as garnishee because incapable of testifying. *President, etc., of Union Turnpike v. Jenkins*, 2 Mass. 37; *Holland v. Leslie*, 2 Har. (Del.) 306.

held to be service upon neither the corporation nor the persons composing it.*

Foreign.

§ 17. A corporation which is chartered in more than one state may be garnished as a domestic corporation in all the states in which it is chartered;¹² and a corporation, under the laws of the United States, is not a foreign corporation in any of the states in which it conducts its business.¹³ But whether or not a foreign corporation may be charged as a garnishee without special statute declaring such corporations to be liable to the process is not agreed. The determination of the question rests upon the same considerations which control the decisions upon the similar liability of nonresident natural persons; therefore, those states which hold that nonresidents cannot be made garnishees hold the same of foreign corporations.¹⁴

**Bartram v. Collins Manuf'g Co.*, 69 Ga. 751.

¹² *Mobile & O. Ry. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21; *Holland v. Mobile & O. Ry. Co.*, 16 Lea (Tenn.) 414; *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Mahany v. Kephart*, 15 W. Va. 609; *Smith v. Boston, C. & M. Ry.*, 33 N. H. 337. See, also, *Sprague v. Hartford, B. & L. Ry. Co.*, 5 R. I. 233.

¹³ *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, 14 N. W. 343; *Losee v. McCarty*, 5 Utah, 528, 17 Pac. 452.

¹⁴ *Gold v. Housatonic Ry. Co.*, 1 Gray, 424; *Danforth v. Penny*, 3 Metc. (Mass.) 564; *Larkin v. Wilson*, 106 Mass. 120; *Smith v. Boston, C. & M. Ry. Co.*, 33 N. H. 337; *Bradford v. Mills*, 5 R. I. 393; *Craig v. Gunn*, 67 Vt. 92, 30 Atl. 860; *Towle v. Wilder*, 57 Vt. 622; *Green v. Farmers' & Citizens' Bank*, 25 Conn. 451; *Alabama G. S. R. Co. v. Chumbey*, 92 Ala. 317, 9 South. 286; *Wright v. Chicago, B. & Q. Ry. Co.*, 19 Neb. 175, 27 N. W. 90; *Plimpton v. Bigelow*, 93 N. Y. 592.

DOING BUSINESS AND ACTIONS ARISING IN THE STATE:
In Maryland, where the statute authorized suits by nonresidents against foreign corporations exercising franchises there "when the cause of action has arisen or the subject of the action shall be situated

It has been further urged that corporations, being merely legal creations, can have no existence outside of the state where they are incorporated.¹⁵ On the other hand, it has been very generally held that foreign corporations are liable to be charged as garnishees the same as domestic corporations, without express statute.¹⁶ Many garnishment statutes expressly declare that foreign corporations may be garnished;

in this state," it was held that a British insurance company doing business through an agent could not be charged as garnishee on account of a loss under a policy issued to nonresidents by an agent in Chicago, Ill., upon property in that city, because the holders of the policy could not sue the company thereon in Maryland. *Myer v. Liverpool, L. & G. Ins. Co.*, 40 Md. 595.

A foreign insurance company merely having an auditing office in the state held not to be doing business in the state, within the meaning of the statute authorizing the garnishment of foreign corporations doing business in the state. *Schmidlapp v. La Confiance Ins. Co.*, 71 Ga. 246.

Such a company doing business in the state when summoned, and withdrawing afterwards, is "residing in the state" sufficiently to support the garnishment. *Weed Sewing-Machine Co. v. Boutelle*, 56 Vt. 570.

¹⁵ *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *Craig v. Gunn*, 67 Vt. 92, 30 Atl. 860.

¹⁶ *Jones v. New York & E. Ry. Co.*, 1 Grant, Cas. (Pa.) 457; *Fithian v. New York & E. Ry. Co.*, 31 Pa. St. 114; *Barr v. King*, 96 Pa. St. 485; *Brauser v. New England Fire Ins. Co.*, 21 Wis. 516; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214; *Hannibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Midland Pac. Ry. Co. v. McDermid*, 91 Ill. 170; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537; *Selma, R. & D. Ry. Co. v. Tyson*, 48 Ga. 351; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870; *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. St. 519, 30 Pac. 660; *New Orleans, I. & G. N. Ry. Co. v. Wallace*, 50 Miss. 244; *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, 11 N. W. 343; *Rainey v. Maas*, 51 Fed. 580; *Burlington & M. R. Ry. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622; *Mobile & O. Ry. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21.

and inasmuch as corporations are mere creations of local law, and even the recognition of their existence by other states depends purely upon the comity of those states, the conditions upon which they shall be allowed recognition and the right to do business are absolutely within the discretion of the legislature. It follows that, whether reasonable or unreasonable in their conditions, these statutes are valid and binding.¹⁷ In such cases it is no defense to say that the debt sought to be reached is not made payable in the state,¹⁸ or, by the terms of the contract, is payable elsewhere.¹⁹

¹⁷ *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. 93; *National Bank v. Huntington*, 129 Mass. 444; *Cousens v. Lovejoy*, 81 Me. 467, 17 Atl. 495; *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663.

¹⁸ *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538.

¹⁹ *Roche v. Rhode Island Ins. Co.*, 2 Ill. App. 360.

PROTECTIVE FORCE OF JUDGMENT AGAINST GARNISHEE: A Connecticut corporation, having agents and doing business in Pennsylvania, insured property situated in and belonging to a resident of New Jersey; and, after the insured property was destroyed by fire and the loss adjusted, a Massachusetts creditor of the insured brought suit against him, and garnished the insurance money in a Pennsylvania court, and recovered judgment against defendant and garnishee; and, after the garnishment was served, an assignee of the insured sued the insurance company in New Jersey, claiming that the Pennsylvania court had no jurisdiction. Upon a bill of interpleader by the insurance company against all the parties, the court upheld the garnishment saying: "It is difficult to perceive what difference it makes to Chambers [the defendant] or his subsequent assignee whether it [the garnishment] be instituted in Pennsylvania, as the conventional domicile of the garnishee, or in Connecticut, its actual domicile. * * * No question can possibly be raised as to the right of the legislature of Connecticut (complainant's domicile of origin) to authorize its court to entertain such jurisdiction. * * * If, then, the courts of Pennsylvania were open, as the course of decisions shows them to be, to Mr. Chambers to sue the complainant on his policy in the

Municipal Corporations.

Are not Garnishable.

§ 18. It has been held upon grounds of public policy that municipal corporations, such as townships,²⁰ counties,²¹ cities,²² school districts,²³ school boards,²⁴

state of Pennsylvania, why was not the right to do so attachable?" *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663. See, also, post, § 245.

²⁰ *Bradley v. Richmond*, 6 Vt. 121. Contra: *Bray v. Wallingford*, 20 Conn. 416; *Whidden v. Drake*, 5 N. H. 13. See, also, *Walker v. Cook*, 129 Mass. 577.

²¹ *McDougal v. Board of Sup'rs of Hennepin Co.*, 4 Minn. 184 (Gil. 130); *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *State v. Eberly*, 12 Neb. 616, 12 N. W. 96; *Merrell v. Campbell*, 49 Wis. 535, 5 N. W. 912; *Ward v. Hartford Co.*, 12 Conn. 404; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896; *Boone Co. v. Keck*, 31 Ark. 387; *Board of Com'rs of Las Animas Co. v. Bond*, 3 Colo. 411; *Stermer v. Board of Com'rs of La Plata Co.* (Colo. App.) 38 Pac. 839; *Board of Com'rs of Mesa Co. v. Brown* (Colo. App.) 39 Pac. 989; *Gann v. Cribbs* (Colo. App.) 41 Pac. 829; *Sheppard v. Cape Girardeau Co.* (Mo. Sup.) 1 S. W. 305. Contra: *Waterbury v. Board of Com'rs of Deer Lodge Co.*, 10 Mont. 515, 26 Pac. 1002; *Adams v. Tyler*, 121 Mass. 380.

²² *Memphis v. Laski*, 9 Heisk. (Tenn.) 511, 24 Am. Rep. 327; *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141; *Fortune v. St. Louis*, 23 Mo. 239; *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. Racine*, 26 Wis. 449; *Baltimore v. Root*, 8 Md. 95; *Switzer v. Wellington*, 40 Kan. 250, 19

²³ *School Dist. No. 4 of Marathon v. Gage*, 39 Mich. 484, 33 Am. Rep. 421; *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273; *Chamberlain v. Watters*, 10 Utah, 298, 37 Pac. 566; *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643; *Kein v. School Dist.*, 42 Mo. App. 460; *Millison v. Fisk*, 43 Ill. 112; *Bivens v. Harper*, 59 Ill. 21. Contra: *Seymour v. Over River School Dist.*, 53 Conn. 502, 3 Atl. 552; *Burton v. District Township of Warren*, 11 Iowa, 166; *Whalen v. Harrison*, 11 Mont. 63, 27 Pac. 384.

²⁴ See following page.

and the like, are not subject to garnishment process unless expressly included in the terms of the statute; and almost as frequently it has been decided that they are, as will appear by the cases cited contra above.

Municipal Officers not Garnishable.

§ 19. Where it is held that municipal corporations are not subject to garnishment, their officers are likewise exempt from liability for what they hold in their official capacity. Besides several of the above cases in which garnishment of the officer has been treated as a garnishment of the municipality, this question has been adjudicated in cases in which it has been attempted to charge as garnishee a loan officer,²⁵ a pros-

Pac. 620; *First Nat. Bank v. Ottawa*, 43 Kan. 294, 23 Pac. 485; *People v. Omaha*, 2 Neb. 166; *Mobile v. Rowland*, 26 Ala. 498; *Porter & Blair Hardware Co. v. Perdue* (Ala.) 16 South. 713; *Erie v. Knapp*, 29 Pa. St. 173; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Bank of Southern Georgia v. Mayor, etc., of Americus*, 92 Ga. 361, 17 S. E. 287; *Leake v. Lacey* (Ga.) 22 S. E. 655. CONTRA: *Rodman v. Musselman*, 12 Bush (Ky.) 354, 23 Am. Rep. 724; *Newark v. Funk*, 15 Ohio St. 462; *Wales v. Muscatine*, 4 Iowa, 302; *Clapp v. Walker*, 25 Iowa, 315; *Adams v. Tyler*, 121 Mass. 380; *Wilson v. Lewis*, 10 R. I. 285; *Mayor, etc., of Jersey City v. Horton*, 38 N. J. Law, 88; *City of Laredo v. Nalle*, 65 Tex. 359; *City of Denver v. Brown*, 11 Colo. 337, 18 Pac. 214; *Sauer v. Nevadaville*, 14 Colo. 54, 23 Pac. 87.

²⁴ *Clark v. Mobile School Com'rs*, 36 Ala. 621; *Board of Education of City and County of San Francisco v. Blake* (Cal.) 38 Pac. 536; *Dollman v. Moore*, 70 Miss. 267, 12 South. 23; *Bulkly v. Eckert*, 3 Pa. St. 368; *Born v. Williams*, 81 Ga. 796, 7 S. E. 868; *Bank of Southern Georgia v. Mayor, etc., of Americus*, 92 Ga. 361, 17 S. E. 287.

When the statute makes neither the township nor the school district liable for teacher's wages otherwise than on order of the school committee, held, that the wages were not garnishable till the order is given, as no one is liable till then. *Spencer v. School Dist. No. 17 of Warwick*, 11 R. I. 537.

²⁵ *Spalding v. Imlay*, 1 Root (Conn.) 551.

ecuting attorney,²⁶ chief of police,²⁷ a county clerk,²⁸ a county treasurer,²⁹ and a city treasurer.³⁰ Attempts to charge public officers for the debts of the public body they represent must always fail, if for no other reason than that they are not personally liable.³¹

A Matter of Statutory Construction.

§ 20. The whole question depends upon statutory construction; and if the garnishment or other statutes in pari materia indicate an intention on the part of the legislature to make such corporations and their officers subject to the process, or exempt from it, the courts are bound to fulfill that intention, although not expressly stated.³²

Reasons for Exempting Municipal Corporations.

§ 21. The reasons given for holding public corporations and their officers not subject to garnishment process except by force of special statute that they shall be are that they are a part of the government; hold their powers in trust for the common good; should be permitted to act only with reference to that object; that the settlement of their accounts and the transaction of the public business should not be interfered with to promote private interest or convenience; that the public welfare might be seriously interrupted if

²⁶ Stillman v. Isham, 11 Conn. 124.

²⁷ Connolly v. Thurber Whyland Co., 92 Ga. 651, 18 S. E. 1004.

²⁸ Merrell v. Campbell, 49 Wis. 535, 5 N. W. 912; Smith v. Finlen, 23 Ill. App. 156.

²⁹ Chealy v. Brewer, 7 Mass. 259.

³⁰ Triebel v. Colburn, 64 Ill. 376; Smith v. Woolsey, 22 Ill. App. 185.

³¹ Id. See, also, post, § 57.

³² City of Denver v. Brown, 11 Colo. 337, 18 Pac. 214; Jenks v. Osceola Tp., 45 Iowa, 554; Wilson v. Lewis, 10 R. I. 285.

these officers could at any time be called away from their municipal duties to answer and defend the litigation of private creditors of the corporations; and that the public weal would be imperiled if contractors and employes, as well as the enterprises of the corporation, could be thus paralyzed by the seizure and sequestration of the wages upon which the contractors and employes depend for the performance of their contracts.³³

Reasons for not Exempting Municipal Corporations.

§ 22. Those courts which hold municipal corporations liable to be made garnishees under the general terms of the statutes deny the soundness and weight of these arguments in actual practice, maintaining that there is no reason why the public functions of these bodies or the transaction of their business need be deranged or improperly performed by reason of their being compelled by legal process to hold and finally pay over a sum of money in which they have no interest to one person rather than another. They urge that the garnishee has no suit to defend, no counsel to employ, no witnesses to collect or pay; that no burden is cast upon it, and no duty, except to act as stakeholder to await the determination of an action in which it has no interest. As to the sequestration of

³³ *Memphis v. Laski*, 9 Heisk. (Tenn.) 511, 24 Am. Rep. 327; *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204; *Leake v. Lacey* (Ga.) 22 S. E. 655. See, also, cases above cited.

Where it is held that only money due on contract can be reached by garnishment, it is held that fees due a juror, and the like, cannot be reached by garnishing the county, for there is no privity of contract. *Williams v. Boardman*, 9 Allen (Mass.) 570. See, also, *Walker v. Cook*, 129 Mass. 577.

the wages of public officers, it is said that the public generally has no difficulty in obtaining employes to do its work; that, surely, as good service may be obtained from those who pay their debts as from those who avoid such payment; and that it would be impolitic to induce dishonest persons to seek public employment by protecting them in such avoidance.³⁴

Exemption a Privilege Which may be Waived.

§ 23. Where such corporations are held exempt from liability, it is generally considered as an exemption for their benefit, which they may waive, and, being a personal privilege, that it cannot be claimed by the defendant.³⁵

³⁴ Waterbury v. Board of Com'rs of Deer Lodge Co., 10 Mont. 515, 26 Pac. 1002. See cases cited above.

³⁵ Commissioners of Las Animas Co. v. Bond, 3 Colo. 411; Burton v. District Township of Warren, 11 Iowa, 166; Clapp v. Walker, 25 Iowa, 315; Dollman v. Moore, 70 Miss. 267, 12 South. 23; Skelly v. Westminister School Dist., 103 Cal. 652, 37 Pac. 643. Contra: School Dist No. 4 of Marathon v. Gage, 39 Mich. 484, 33 Am. Rep. 421; Born v. Williams, 81 Ga. 796, 7 S. E. 868.

Although a person in the employ of a municipality may claim the exemption, as well as the municipality itself, and neither could waive the exemption, so as to bind the other, yet when he has ceased to be an employé, and the demand has been merged in a judgment, the demand represented by this judgment may be reached by garnishment against the municipality if it waives its exemption, although the defendant objects to such waiver. Baird v. Rogers (Tenn.) 32 S. W. 630.

WHAT AMOUNTS TO WAIVER: Held, that the exemption is not waived by a county clerk answering for the county the interrogatories accompanying the writ, as in doing so he acted in the character of a witness merely, and did not represent the county. Stermer v. Board of Com'rs of La Plata Co. (Colo. App.) 38 Pac. 839. Held, that the exemption is not waived by failure to urge it before a commissioner appointed by the court to take garnishée's answer, the commissioner

Chancery Garnishment.

§ 24. There are also decisions to the effect that, though such corporations be considered as exempt from the statutory garnishment at law, yet the plaintiff may acquire the same benefits by a bill in equity making a proper showing.³⁶

having no authority to pass upon the question of exemption. *Jenks v. Osceola Tp.*, 45 Iowa, 554. Compare *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 621. Whether making plaintiffs parties to suit to settle defendant's accounts waives exemption, query. *County of Des Moines v. Hinkley*, 62 Iowa, 637, 17 N. W. 915.

EXEMPTION CANNOT BE WAIVED: "The exemption is not for the benefit of the officer, but because the public is not to be harassed and inconvenienced by petty suits in the shape of garnishments." *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276. Therefore, the officers of the municipality for the time being cannot waive the exemption, and the court will dismiss the proceeding on the motion of an amicus curiæ. *Porter & Blair Hardware Co. v. Perdue* (Ala.) 16 South. 713.

If the officers were allowed to claim the privilege or not, they could waive the exemption in favor of one creditor, and insist upon it against another, which would be impermissible. *First Nat. Bank v. Ottawa*, 43 Kan. 294, 23 Pac. 485.

After the release of the garnishee city on bond, held, that the sureties on the bond may defend that the city was exempt. *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552; *Born v. Williams*, 81 Ga. 796, 7 S. E. 868.

If the garnishee fails to claim the exemption, allows judgment to be rendered against it, and pays the judgment, such payment constitutes no defense to an action against it by its creditor, to recover the amount of his wages. *School Dist. No. 4 of Marathon v. Gage*, 39 Mich. 484, 33 Am. Rep. 421. Contra: *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643.

³⁶ *Pendleton v. Perkins*, 49 Mo. 565; *Speed v. Brown*, 10 B. Mon. (Ky.) 108; *Dollman v. Moore*, 70 Miss. 267, 12 South. 23.

State and National Governments and Their Officers.

Not Garnishable except by Consent.

§ 25. Every consideration adverse to holding municipal corporations liable to garnishment applies to similar proceedings against the governments and their officers.³⁷ Moreover, the government, being the sovereign, cannot be sued without its own consent, signified by express statute.³⁸ Garnishment proceedings are in the nature of a suit or proceeding against the garnishee, and therefore the governments cannot be made garnishees unless their statutes expressly declare that they may be.³⁹

³⁷ Drake, *Attachm.* § 516a; *Buchanan v. Alexander*, 45 U. S. 20.

³⁸ *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Beers v. Arkansas*, 20 How. 527; *Hunsaker v. Borden*, 5 Cal. 288, 290, 63 Am. Dec. 130.

The people of the state, being the sovereign, have succeeded to the rights of the king; and "when a statute is general, and any prerogative right, title, or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him." *People v. Herkimer*, 4 Cow. (N. Y.) 345, 15 Am. Dec. 379.

³⁹ *McMeekin v. State*, 9 Ark. 553; *Loder v. Baker*, 39 N. J. Law, 49; *Rollo v. Andes Ins. Co.*, 23 Grat. (Va.) 509, 14 Am. Rep. 147; *Providence & S. S. Co. v. Virginia F. & M. Ins. Co.*, 11 Fed. 284; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896.

"It would be a strange anomaly in the law if by his [defendant's] procurement his creditor could, by indirection, litigate against the commonwealth the amount of that claim which he could not himself directly try." *Dewey v. Garvey*, 130 Mass. 87.

A VOUCHER for money due from the United States is garnishable as a chose in action in the hands of a private individual, for this involves no proceeding against the government. *Leighton v. Heagerty*, 21 Minn. 42. Compare *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630.

CHANCERY GARNISHMENT: The plaintiff cannot obtain the benefits of a garnishment by a bill in chancery to which the govern-

Public Officers not Garnishable.

§ 26. The objection cannot be obviated, and the same object obtained, by ignoring the government, and proceeding directly against the officer having custody of the property sought to be reached.⁴⁰

ment or the officer is made a party. *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.) 379. But it may be that the same thing may be accomplished to a large extent by injunction against the defendant. *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215.

⁴⁰ *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; *Tate v. Salmon*, 79 Ky. 540; *Buchanan v. Alexander*, 4 How. 20; *Averill v. Tucker*, 2 Cranch, C. C. 544, Fed. Cas. No. 670; *Fischer v. Daudistal*, 9 Fed. 145; *Wild v. Ferguson*, 23 La. Ann. 752; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 111; *Debbins v. Orange & A. Ry. Co.*, 37 Ga. 240; *O'Neill v. Sewell*, 85 Ga. 481, 11 S. E. 831.

OFFICER OF DE FACTO GOVERNMENT: During the Rebellion, an agent of the Confederacy who, as such, received property, was afterwards summoned as garnishee; and it was held that, though the government was illegal, it was the de facto government, and its agents could not be made garnishees. *Wilson v. Bank of Louisiana*, 55 Ga. 98.

MONEY BELONGS TO GOVERNMENT TILL PAID OUT: "Money in the hands of a disbursing officer of the United States due to a private person cannot be attached on process against such person out of a state court, because the money will not be his, but will remain the property of the United States until paid to him." *Gilbert v. Quimby*, 1 Fed. 111, 17 Blatchf. 402; citing *Buchanan v. Alexander*, 4 How. 20.

MONEY DUE FOR PENSIONS while in the hands of the disbursing officer or agent for distribution, or in course of transmission to the pensioner, is not liable to be seized by creditors under any legal process. *Jardain v. Fairton Saving Fund & Building Ass'n*, 44 N. J. Law, 376. See, also, post, § 99.

WHEN GOVERNMENT IS PLAINTIFF: As the rule that the government and its officers cannot be made garnishees is established solely in the interest of the former, it does not apply when the government is the plaintiff. *U. S. v. Murdock*, 18 La. Ann. 305, 89 Am. Dec. 651.

Courts and Their Officers.

Not Garnishable for Property Held Officially.

§ 27. "When property or money is in custodia legis, the officer holding it is the mere hand of the court. His possession is the possession of the court. To interfere with his possession is to invade the jurisdiction of the court itself. And an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied."⁴¹ These principles have been applied in numerous cases, to various classes of legal custodians,

⁴¹ In re Cunningham, Fed. Cas. No. 3,478, 19 N. B. R. 276, and 9 Cent. Law J. 208, in which it was attempted to charge an assignee in bankruptcy as garnishee.

CLIPPINGS FROM OTHER DECISIONS: "It would lead to great confusion if such an officer [a receiver] were to be subject or were to be at liberty to take the funds in his official custody into any other tribunal, which could have no power to discharge him, to settle his accounts, or to punish him for collusion." Tremper v. Brooks, 40 Mich. 333.

"In the common case of agents, trustees, and factors, the creditor can easily place himself in the shoes of the absconding debtor, and prosecute his claim without inconvenience to the garnishee. But such would not be the case with an executor. It would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate, where they ought to be settled, before the courts of law, who would have no power to adjust and settle his accounts." Winchell v. Allen, 1 Conn. 385.

"While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently it is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to bring the money into court, so that it

and in accordance with them it has been held that clerks of courts,⁴² trial justices,⁴³ registers in chancery,⁴⁴ masters in chancery,⁴⁵ receivers,⁴⁶ trustees appointed by a court of chancery,⁴⁷ assignees in bank-

might be subject to their orders." *Dawson v. Holcomb*, 1 Ohio, 276, 13 Am. Dec. 618. See, also, *Dubois v. Dubois*, 6 Cow. (N. Y.) 494; *Turner v. Fendall*, 1 Cranch, 116.

⁴² *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478; *Lord v. Collins*, 79 Me. 227, 9 Atl. 611; *Draue v. McGavock*, 7 Humph. (Tenn.) 132; *Sibert v. Humphries*, 4 Ind. 481; *Ross v. Clarke*, 1 Dall. 354; *Overton v. Hill*, 1 Murph. (N. C.) 47; *Alston v. Clay*, 2 Hayw. (N. C.) 171; *Hunt v. Stevens*, 3 Ired. (N. C.) 365; *Farmer's Bank v. Beaston*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; *Murrell v. Johnson*, 3 Hill (S. C.) 12; *Bowden v. Schatzell*, Bailey, Eq. (S. C.) 360, 23 Am. Dec. 170; *Pace v. Smith*, 57 Tex. 555; *Sweetzer v. Claffin*, 74 Tex. 667, 12 S. W. 395; *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614; *Lewis v. Dubose*, 29 Ala. 219; *Falconer v. Head*, 31 Ala. 513.

⁴³ *Burnham v. Beal*, 96 Mass. 217.

⁴⁴ *Voorhees v. Sessions*, 34 Mich. 99.

⁴⁵ *McKenzie v. Noble*, 13 Rich. (S. C.) 147; *Walsh v. Horine*, 36 Ill. 238.

⁴⁶ *Tremper v. Brooks*, 40 Mich. 333; *Field v. Jones*, 11 Ga. 413; *Taylor v. Gillian*, 23 Tex. 508; *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *McGowan v. Myers*, 66 Iowa, 99, 23 N. W. 282; *Adams v. Haskell*, 6 Cal. 113, 65 Am. Dec. 491; *County of Yuba v. Adams*, 7 Cal. 35; *Farmer's Bank v. Beaston*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; *Nelson v. Connor*, 6 Rob. (La.) 339; *Kreisle v. Campbell* (Tex. Sup.) 33 S. W. 832.

As to the extent to which the United States judiciary act of 1887 allows garnishment without consent of court against receivers appointed by United States courts, see *Irwin v. McKechnie*, 58 Minn. 145, 59 N. W. 987; *Central Trust Co. v. Chattanooga, R. & C. Ry. Co.*, 68 Fed. 685.

A statute providing that any receiver may sue or be sued, in his official capacity, without first having obtained leave of the court appointing such receiver to bring such suit, has been held not to authorize garnishing a receiver; the reason for the decision being that garnishment is not a suit. *Kreisle v. Campbell* (Tex. Sup.) 33 S. W. 852.

⁴⁷ *Bentley v. Shrieve*, 4 Md. Ch. 412.

ruptcy,⁴⁸ trustees for creditors under a general assignment pursuant to insolvent laws,⁴⁹ other trustees appointed to dispose of property and apply the avails ac-

⁴⁸ In re Bridgman, 2 N. B. R. 252, 1 Chi. Leg. News, 103, and Fed. Cas. No. 1867; In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918; In re Chisholm, 4 Fed. 526; Akins v. Stradley, 51 Iowa, 414, 1 N. W. 609; Jackson v. Miller, 9 N. B. R. 143; Gilbert v. Lynch, 1 Fed. 111, 17 Blatchf. 402; Ashley, Attachm. (2d Ed.) 29; 9 Petersd. Abr. 711.

A very carefully considered opinion on this question will be found in Re Cunningham, 19 N. B. R. 276, 9 Cent. Law J. 208, and Fed. Cas. No. 3,478.

⁴⁹ Cross v. Brown (R. I.) 33 Atl. 147, 156; Colby v. Coates, 60 Mass. 558; Dewing v. Wentworth, 65 Mass. 499; Thayer v. Tyler, 5 Allen, 94; Lord v. Meachem, 32 Minn. 66, 19 N. W. 346; Kimball v. Mulhern, 15 Ill. 205.

Whether an assignee under a valid assignment for benefit of creditors may be made a garnishee in any case without his consent, query. Keppel v. Moore, 66 Mich. 292, 295, 33 N. W. 499.

Assignee held garnishable for debt due for services in administering the assignment. Stuckey v. McKibbon, 92 Ala. 622, 8 South. 379.

Assignees for creditors cannot be charged as garnishees of the assignor, for the all-sufficient reason that the property does not belong to the latter. Kimball v. Mulhern, 15 Ill. 205; Van Winkle v. Iowa, I. & S. F. Co., 56 Iowa, 245, 9 N. W. 211; Huffman Implement Co. v. Templeton (Tex. App.) 14 S. W. 1015.

Such a garnishment entitles the plaintiff to whatever may be coming to the defendant after the trust is executed, and therefore should be allowed to stand till it can be determined whether anything is left. Moody v. Carroll, 71 Tex. 143, 8 S. W. 510.

"VOID ASSIGNMENTS:" See post, § 75.

In sustaining a bill in equity to set aside and declare void a general assignment under state laws, set up by the garnishee as a defense, Judge Woolson used the following language: "The first point raised by the pleading of said Barnes is as to whether property in the possession of an assignee under a general assignment for the benefit of creditors is, in the state of Iowa, in custodia legis, so that this court cannot act with reference thereto, or as to the validity of said assignment. * * * If an assignee, carrying into operation within this state a general assignment for the benefit of creditors, is, within the recognized definition of the term as used in

cording to the orders of the court,⁵⁰ sheriffs, constables, and other ministerial officers,⁵¹ and their bailees

this respect, an 'officer' of the court wherein he files his bond, and to whom he makes his reports, then the property in his hands as such assignee is beyond the power of this court, because the same is within the dominion of, and undisposed of by, the state court; and, as to the funds in the hands of such garnishee, it would seem that the plea must be sustained. The question as to whether such an assignee, in whatever state he may be acting, is an officer of that court which has supervision of his acts, has not met with uniformity of answer. To a considerable degree, this contrariety of views may be explained by the differing provisions of statutory enactment in the different states regarding the relation which such assignee sustains to the court to whom his reports are made, and whose direction he follows in the performance of his duties. That receivers appointed by the direct order of the court, and executors and administrators receiving their appointment from the court, are officers of the courts whose appointments they bear, so far as regards the question now under consideration, has passed beyond the point of doubt, and is settled by the decisions of all the courts to which counsel have called our attention. But the assignee, in Iowa, does not receive his appointment from the court; and while, under the statutes of this state, he is subject to the orders of the state court, and may even be removed by that court for causes provided in the state statutes, yet his appointment is wholly the voluntary act of the assignor. The debtor cannot be compelled to make the assignment. Nor can the state court, by an order or decree, obtain control over, or possession of, the debtor's property, and place it in the hands of such assignee." *Rothschild v. Hasbrouck*, 65 Fed. 283. This case contains an elaborate opinion, reviewing a large number of federal decisions.

⁵⁰ *Fenton v. Fisher*, 106 Pa. St. 418; *Cockey v. Leister*, 12 Md. 124, 71 Am. Dec. 588; *Thayer v. Tyler*, 5 Allen, 94.

⁵¹ *Wilder v. Bailey*, 3 Mass. 289; *Pollard v. Ross*, 5 Mass. 319; *Thompson v. Brown*, 17 Pick. 462; *Robinson v. Howard*, 7 Cush. 257; *Turner v. Fendall*, 1 Cranch, 116; *Zurcher v. Magee*, 2 Ala. 253; *Clarke v. Shaw*, 28 Fed. 356; *Dawson v. Holcomb*, 1 Ohio, 274, 13 Am. Dec. 618; *Marvin v. Hawley*, 9 Mo. 378, 43 Am. Dec. 547; *Hill v. La Crosse & M. Ry. Co.*, 14 Wis. 291, 80 Am. Dec. 783; *Clymer v. Willis*, 3 Cal. 364, 58 Am. Dec. 414; *Reddick v. Smith*, 4 Ill. 451;

and assistants,⁵² justices of the peace,⁵³ executors,⁵⁴ administrators,⁵⁵ and guardians,⁵⁶ cannot be charged as garnishees by reason of any property or money

Lightner v. Steinagel, 33 Ill. 510, 85 Am. Dec. 292; *Pawley v. Gaines*, 1 Overt. (Tenn.) 208; *Blair v. Cantey*, 2 Speer (S. C.) 34, 42 Am. Dec. 360; *Burrell v. Letson*, 2 Speer (S. C.) 378, 1 Strob. 239; *Alston v. Clay*, 2 Hayw. (N. C.) 171; *Jones v. Jones*, 1 Bland, Ch. (Md.) 443, 18 Am. Dec. 327; *Connolly v. Thurber Whyland Co.*, 92 Ga. 651, 18 S. W. 1004.

If a sheriff is not liable for money collected on an execution, surely he could not be charged by reason of an execution in his hands upon which he had received nothing. *Sharp v. Clark*, 2 Mass. 91. But see *Conover v. Ruckman*, 33 N. J. Eq. 303.

⁵² *Penniman v. Ruggles*, 6 Mass. 166. Contra, *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

⁵³ *Corbyn v. Bollman*, 4 Watts & S. (Pa.) 342; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275, 5 N. W. 311; *Hooks v. York*, 4 Ind. 636. Contra: *Clark v. Boggs*, 6 Ala. 809, 41 Am. Dec. 85; *Patterson v. Pratt*, 19 Iowa, 358.

⁵⁴ *Shewell v. Keen*, 2 Whart. (Pa.) 332, 30 Am. Dec. 266; *Barnett v. Weaver*, 2 Whart. (Pa.) 418; *Barnes v. Treat*, 7 Mass. 271; *Winchell v. Allen*, 1 Conn. 385; *Picquet v. Swan*, 4 Mason, 443, Fed. Cas. No. 11,133; *Case Threshing-Machine Co. v. Miracle*, 54 Wis. 295, 11 N. W. 580; *Whitehead v. Coleman*, 31 Grat. (Va.) 784; *Norton v. Clark*, 18 Nev. 247, 2 Pac. 529; *In re Hurd*, 9 Wend. (N. Y.) 465; *Young v. Young*, 2 Hill (S. C.) 425; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Post v. Love*, 19 Fla. 634.

⁵⁵ *Brooks v. Cook*, 8 Mass. 246; *Waite v. Osborne*, 11 Me. 185; *Thorn v. Woodruff*, 5 Ark. 55; *Fowler v. McLelland*, 5 Ark. 188; *Gill v. Middleton* (Ark.) 29 S. W. 465; *Parker v. Donnally*, 4 W. Va. 648; *Conway v. Remington*, 11 R. I. 116; *Lyons v. Houston*, 2 Har. (Del.) 349; *Short v. Moore*, 10 Vt. 446; *Stout v. La Follette*, 64 Ind. 365; *Curling v. Hyde*, 10 Mo. 374.

As to continuing proceedings against the executor or administrator of the garnishee after his death, see post, § 381.

⁵⁶ *Gassett v. Grout*, 4 Metc. (Mass.) 486; *Hansen v. Butler*, 48 Me. 81; *Perry v. Thornton*, 7 R. I. 15; *Davis v. Drew*, 6 N. H. 399, 25 Am. Dec. 467; *Vierheller v. Brutto*, 6 Ill. App. 95.

But one indebted to a spendthrift under guardianship is chargeable as garnishee of the spendthrift. *Hicks v. Chapman*, 10 Allen, 463.

which they hold or any debts which they owe merely as such officers.

Some Officers Held not within the Rule.

§ 28. In a few of the states, while these principles are recognized as sound, they have been considered inapplicable to certain of the cases above mentioned, either generally or in view of the peculiar provisions of the statute governing the conduct of the particular officer. Among these may be mentioned sheriffs and constables,⁵⁷ clerks in chancery courts,⁵⁸ justices of the peace,⁵⁹ administrators,⁶⁰ and executors.⁶¹

⁵⁷ *Hurlburt v. Hicks*, 17 Vt. 193, 44 Am. Dec. 329; *Bullard v. Hicks*, 17 Vt. 198; *Lovejoy v. Lee*, 35 Vt. 430; *Woodbridge v. Morse*, 5 N. H. 519; *Burleson v. Milan*, 56 Miss. 399.

The statute requiring the sheriff to pay the money raised on execution directly to the creditor, held, that he may be charged therefor as garnishee. *New Haven Sawmill Co. v. Fowler*, 28 Conn. 103, overruling *Willes v. Pitkin*, 1 Root (Conn.) 47, and *Geary v. Shepard*, Id. 544.

To attach property held by an officer by legal process, he should be proceeded against as garnishee; a notice merely to him is not sufficient. *Locke v. Butler*, 19 Ohio St. 587.

IN NEW JERSEY it is settled law that, when a sheriff or constable has collected money on an execution issued out of one court,

⁵⁸ *Trotter v. Lehigh Zinc & Iron Co.*, 41 N. J. Eq. 229, 3 Atl. 95.

⁵⁹ *Clark v. Boggs*, 6 Ala. 809, 41 Am. Dec. 85.

⁶⁰ *Hardesty v. Campbell*, 29 Md. 533; *Terry v. Lindsay*, 3 Stew. & P. (Ala.) 317; *Tillinghast v. Johnson*, 5 Ala. 514.

But when the principal defendant, as heir, had an undivided and unascertained interest only, it was held that the administrator could not be charged as garnishee. *Mock v. King*, 15 Ala. 66. Contra: *Stratton v. Ham*, 8 Ind. 84, 65 Am. Dec. 754; *Palmer v. Noyes*, 45 N. H. 174.

⁶¹ *Stratton v. Ham*, 8 Ind. 84, 65 Am. Dec. 754; *Palmer v. Noyes*, 45 N. H. 174.

Exemption not a Privilege of the Officer, but of the Court.

§ 29. The exemption from garnishment in any case, as before intimated, rests upon the rights of the court whose officer has the property in charge, and not upon any immunity of the officer himself. Therefore, it is no defense that the person summoned as garnishee happens to be an officer of court, so long as the property for which he is sought to be charged is not held by him in his official capacity.⁶² For the same reason, the court may, and, if justice requires, it pre-

he is liable as garnishee of the plaintiff in execution upon a garnishment issued out of another court; and to make the proceeding effectual, and at the same time avoid clashing of courts, the sheriff should, pursuant to the command of his writ, pay the money into the court issuing the execution, and it will make such disposition of it as justice requires. "He should bring the money into the court, and give notice to the plaintiff in attachment or to the auditors that he has done so. The court can then control the application of the funds, and protect their officer in the discharge of his duty. If, after paying the money into court, a sheriff should be sued on scire facias as a garnishee, he may protect himself by showing that he has obeyed the process under which he raised the money." *Crane v. Freese*, 16 N. J. Law, 305; *Davis v. Mahany*, 38 N. J. Law, 104; *Conover v. Ruckman*, 33 N. J. Eq. 303, 32 N. J. Eq. 685; *Trotter v. Lehigh Zinc & Iron Co.*, 41 N. J. Eq. 229, 3 Atl. 95.

PROPERTY TAKEN UNDER VOID PROCEEDINGS: Under a statute providing that sheriffs and constables shall be exempt from garnishment for moneys and property received by them under any execution or other process in favor of the principal defendant, it was held that a constable might be charged for money collected on a process against such defendant. *Storm v. Adams*, 56 Wis. 137, 143, 14 N. W. 69.

⁶² *First Nat. Bank v. Portland & O. Ry. Co.*, 2 Fed. 831; *Marine Nat. Bank v. Whiteman Paper Mill*, 49 Minn. 133, 51 N. W. 665; *Johnson v. Mason*, 16 Mo. App. 271; *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. 818.

sumably will, grant leave to garnish property in the possession of its officers.⁶³

Chancery Garnishment.

§ 30. It is also held that in many cases in which garnishment could not be maintained by ordinary proceedings at law, because of the official liability of the garnishee, the benefits of garnishment may be secured by a bill in chancery, as that court, by its liberal powers, can fully protect the parties.⁶⁴

⁶³ Cohnen v. Black (Mich.) 63 N. W. 641; Tremper v. Brooks, 40 Mich. 333.

In cases without the rule, no consent is necessary. Phelan v. Ganeshim, 5 Colo. 14.

An assignee in bankruptcy being garnished in a state court without permission to garnish him being first obtained from the court appointing him, the state court rendered judgment against the garnishee, and ordered that no execution issue on such judgment till the United States court appointing the assignee should order him to pay to the plaintiff. Upon a petition being presented to such United States court to make such an order, that court denied the petition, saying: "I do not know of any law or usage which would justify the court in making such an order. If the question were between the original parties, there would be less difficulty; but other rights have intervened. The dividend has been assigned, and the assignee is before the court, claiming under his assignment. Seeing that the garnishment was without jurisdiction, and therefore absolutely null, there was no lien, and nothing pending in the nature of a judicial proceeding of which the assignee of the dividend was bound to take notice. I cannot, therefore, see but that he had a perfect right to purchase the dividend." In re Cunningham, 19 N. B. R. 276, 9 Cent. Law J. 208, and Fed. Cas. No. 3,478. But see post, § 402.

⁶⁴ Earle v. Grove. Circuit Judge, 92 Mich. 285, 52 N. W. 615; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478; McGowan v. Myers, 66 Iowa, 99, 23 N. W. 282; Whitehead v. Coleman, 31 Grat. (Va.) 784. But see Lord v. Collins, 79 Me. 227, 9 Atl. 611.

Statutes Affecting Liability of Court Officers.

§ 31. In some states certain classes of legal custodians have been declared by special statute to be liable to garnishment in their official capacity.⁶⁵ Under a statute authorizing the garnishment of executors and administrators, it has been held that they are chargeable for claims of the defendant against the estate, though there has as yet been no settlement or order of distribution;⁶⁶ and, such attachment being made, the court will, whenever it is necessary, continue the case until the estate is so far settled as to render it certain that the administrator or executor has assets to pay the liability;⁶⁷ or judgment may be given and execution stayed to give the executor time to sell prop-

⁶⁵ *Parks v. Cushman*, 9 Vt. 320; *Harrington v. Hill*, 51 Vt. 44; *Holbrook v. Waters*, 19 Pick. 354; *Hoffman v. Wetherell*, 42 Iowa, 89; *Cummings v. Garvin*, 65 Me. 301; *Holman v. Fisher*, 49 Miss. 472; *Sapp v. McArdle*, 41 Ga. 628; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659.

These statutes only aid cases clearly within their terms. *Stills v. Harmon*, 7 Cush. 406; *Beverstock v. Brown*, 157 Mass. 565, 32 N. E. 901; *Boyer v. Hawkins*, supra.

⁶⁶ *Wheeler v. Bowen*, 20 Pick. 563; *Hoar v. Marshall*, 2 Gray, 251; *Vantine v. Morse*, 104 Mass. 275; *Simonds v. Harris*, 92 Ind. 505; *Siwinickson v. Painter*, 32 Pa. St. 384; *Lorenz v. King*, 38 Pa. St. 98.

Before the passage of the act of 1843, it was held that the claims against estates could not be reached by garnishment till ascertained by settlement of accounts. *McCreary v. Tapper*, 10 Pa. St. 419; *Bank of Chester v. Ralston*, 7 Pa. St. 482. These statutes cannot sustain garnishments commenced before they were enacted. *Hartle v. Long*, 5 Pa. St. 491. An executrix not qualified cannot be charged as garnishee for property in the actual possession of a special administrator, not under her control. *In re Claims of Flandrow*, 92 N. Y. 256.

As soon as the administrator has given bond and received his letters of administration, he may be garnished. *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. 915.

⁶⁷ *Wheeler v. Bowen*, 20 Pick. 563; *Hoar v. Marshall*, 2 Gray, 251;

erty and pay the judgment, or ascertain whether he has funds to do so; or, in the latter case, the plaintiff may have absolute judgment on giving bond to refund in case the estate proves insufficient.⁶⁸

Limitation of the Rule that Officers of Courts are not Garnishable.

The Reason Limits the Rule.

§ 32. The reason assigned by the authorities for the rule prohibiting the seizure of property or credits by attachment or garnishment while such property is in the custody of the law being that such proceedings would greatly delay and embarrass judicial and other official action in the administration of such property, and would be an intolerable invasion of the jurisdiction of the court having the matters in charge, the great preponderance of modern authorities, proceeding upon the principle that, when the reason for the rule ceases, the rule should not apply, holds that when the purposes of the court have been fully accomplished in respect to the particular funds, by a final decree or order for payment of the same to the defendant by such officer, or his becoming directly and absolutely accountable to the defendant therefor without such order, such property or credit may be reached by garnishing such officer.⁶⁹

Vantine v. Morse, 104 Mass. 275; Mechanics' Sav. Bank v. Waite, 150 Mass. 234, 22 N. E. 915; Palmer v. Noyes, 45 N. H. 174.

⁶⁸ Cady v. Comey, 10 Metc. (Mass.) 459; Hoar v. Marshall, 2 Gray, 251.

⁶⁹ Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518; Weaver v. Davis, 47 Ill. 235.

Officers Garnishable after Court Orders Payment.

§ 33. Under this limitation of the rule, it has been held that money in the hand of a clerk of a court, master in chancery, receiver, or the like, may be garnished after an order of the court directing him to pay to the defendant.⁷⁰

And for Balances after Litigation is Concluded.

§ 34. The same has been held concerning balances remaining in the hands of such officers after the purposes have been accomplished for which the matters

⁷⁰ Gaither v. Ballew, 4 Jones (N. C.) 488, 69 Am. Dec. 764; Duns-moor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518; Weaver v. Davis, 47 Ill. 235; Williams v. Jones, 38 Md. 555; Dunlap v. Patterson Fire Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283; Id., 12 Hun, 627. Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478. Contra, Tremper v. Brooks, 40 Mich. 333.

PROPERTY IN COURT NEVER GARNISHABLE: "There is, in my judgment, an insuperable difficulty in recognizing this view in the present case, growing out of the peculiar jurisdiction in bankruptcy. It cannot for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration, from the time of the adjudication to the final discharge of the estate and the discharge of the assignee. This jurisdiction does not by any means cease with the order of distribution. It is clearly within the power of the court and its duty to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court will punish him for contempt, order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other courts can touch or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly compel the assignee to dispose of the assets or pay over the money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void." In re Cunningham, Fed. Cas. No. 3,478, 9 Cent. Law J. 208, and 19 N. B. R. 276.

were placed in their control.⁷¹ It has also been held that such officers are amenable to garnishment whenever the process does not tend to disturb the control or general orders of the appointing court.⁷²

⁷¹ *Van Riswick v. Lamon*, 2 MacA. (D. C.) 172; *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. 818; *Willard v. Decatur*, 59 N. H. 137; *Leroux v. Baldus* (Tex. Sup.) 13 S. W. 1019; *Wilbur v. Flannery*, 60 Vt. 581, 15 Atl. 203.

GARNISHABLE BEFORE FINAL ACCOUNTING: Held, that a register in chancery may be charged as garnishee in respect of a surplus belonging to the defendant after payment of a mortgage decree, although the sale made thereunder from which the money was received had not been confirmed, and he was directed by the decree to report his doings at the next term of court. *Langdon v. Lockett*, 6 Ala. 727, 41 Am. Dec. 78. "We do not, however, understand from these cases that an attachment cannot be issued and laid in the hands of a trustee before a final account, and that it would not be effective upon a sum ascertained by such an account to be the distributive share of the debtor in the attachment; but that the process, before the account is stated, cannot affect the fund or the trustee, or compel any modification of the final account for the benefit of the attaching creditor." *McPherson v. Snowden*, 19 Md. 197.

WAIVER OF EXEMPTION: Held, that the exemption in any case is a matter of defense; and, unless claimed by the garnishee before final judgment, it is waived. *Groome v. Lewis*, 23 Md. 137, 87 Am. Dec. 563.

BALANCES NOT GARNISHABLE: "A termination of the chancery proceedings under which the money was paid in did not necessarily withdraw it from the control of the court. It still remained in its custody, and subject to its disposal, and Sessions continued to hold it, in his official capacity and character, and in none other. * * * Indeed, there are many, and to us conclusive, reasons why money thus paid into court should remain there subject only to the order of that court, where all the parties interested can be present by their respective counsel, and be heard, as they would be upon motion to dispose of it." *Voorhees v. Sessions*, 34 Mich. 100. To the same effect, see *Pace v. Smith*, 57 Tex. 555; *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614; and *Jones v. Field*, 11 Ga. 413.

⁷² **WHEN GARNISHMENT DOES NOT INTERFERE WITH CONTROL:** *Phelan v. Ganabin*, 5 Colo. 14; *First Nat. Bank v. Port-*

Limitation Applies to Administrators, Executors, Sheriffs, etc.

§ 35. The same principle which governs the above classes of cases renders administrators,⁷³ executors,⁷⁴ and the like, liable to garnishment for money which has been administered by the court, and which it has ordered such executor or guardian to pay to the defendant, and renders sheriffs and other executive officers liable to garnishment for any surplus or residue remaining in their hands after satisfying the writ upon which it was collected.⁷⁵

land & O. Ry. Co., 2 Fed. 831; *Stuckey v. McKibbon*, 92 Ala. 622, 8 South. 379.

"No one will question the correctness of the proposition that property in the hands of receivers appointed by the courts is in custodia legis, and not subject to levy or garnishment. This doctrine receives additional force in this case from the rule of judicial comity between state and federal courts, by which each will refuse to interfere with property in the custody of the other,—a rule which we are always solicitous to observe. But in this case it will be noticed that what is sought to be reached by garnishment is the property, not of the railway company, but of the defendant, viz. a debt due him from the receivers. * * * In view of the fact that receivers of railway companies, as ancillary to winding up the insolvent estate for the benefit of creditors, are authorized to operate the road in lieu of the directors,—sometimes for years,—any other rule would work great injury, and would often leave the creditors of the employes of the receivers remediless." *Irwin v. McKechnie*, 58 Minn. 145, 59 N. W. 987.

⁷³ *Adams v. Barrett*, 2 N. H. 374; *Richards v. Griggs*, 16 Mo. 416, 51 Am. Dec. 240; *Bartell v. Bauman*, 12 Ill. App. 450; *In re Merac's Estate*, 35 Cal. 392, 95 Am. Dec. 111.

⁷⁴ *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *Fitchett v. Dolbee*, 3 Har. (Del.) 267; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659.

⁷⁵ *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Lightner v. Steinagel*, 33 Ill. 516, 85 Am. Dec. 292; *Orr v. McBryde*, 2 Car. Law Repos. 257; *King v. Moore*, 6 Ala. 160, 41 Am. Dec. 44; *Watson v. Todd*, 5 Mass. 271; *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. 818; *Jaquett v. Palmer*, 2 Har. (Del.) 144; *Dickison v. Palmer*, 2 Rich.

Attorneys at Law.

§ 36. There is nothing peculiar about the relation of attorneys either to the courts or to their clients which would exempt them from liability as garnishees of their clients for any property or money in their possession.⁷⁶ But, of course, they cannot be compelled by their answers as such, or by special interrogatories, to disclose confidential communications.⁷⁷ The decisions in which the liability of attorneys to garnishment has been adjudicated are not numerous, but the reports of nearly all the states abound with cases in which they have been so charged without questioning their liability to the process.

Common Carriers.

§ 37. There is no reason why common carriers may not be charged as garnishees for property of the de-

Eq. (S. C.) 407; *Tucker v. Atkinson*, 1 Humph. (Tenn.) 300, 34 Am. Dec. 650; *Wheeler v. Smith*, 11 Barb. (N. Y.) 345; *Hearn v. Crutcher*, 4 Yerg. (Tenn.) 461; *Lovejoy v. Lee*, 35 Vt. 430; *Adams v. Lane*, 38 Vt. 640.

So held of property in hands of sheriff's receptor. *Cole v. Wooster*, 2 Conn. 203.

So held of property taken by sheriffs under void attachment. *Storm v. Adams*, 56 Wis. 137, 14 N. W. 69. Compare *Everett v. Herrin*, 48 Me. 537; *Anthanissen v. Dart*, 92 Ga. 409, 17 S. E. 951.

So held of money in the hands of a sheriff after he has gone out of office. *Robertson v. Beall*, 10 Md. 125.

⁷⁶ *Staples v. Staples*, 4 Me. 532; *Ayer v. Brown*, 77 Me. 195; *Thayer v. Sherman*, 12 Mass. 441; *Cook v. Holbrook*, 6 Allen, 572; *Mann v. Buford*, 3 Ala. 312, 37 Am. Dec. 691; *Tucker v. Butts*, 6 Ga. 580; *Narramore v. Clark*, 63 N. H. 166; *Riley v. Hirst*, 2 Pa. St. 346; *White v. Bird*, 20 La. Ann. 188, 96 Am. Dec. 393. Contra, *Johns v. Allen*, 5 Har. (Del.) 419.

⁷⁷ See post, § 291.

fendant in their possession within the jurisdiction of the court, and not in transit at the time the garnishment process is served, and it is generally conceded that they may be.⁷⁸ But, of course, the garnishee cannot in such cases be compelled at its peril to decide questions of fact of which it has no means of knowledge; and it cannot be charged unless the property is shown to belong to the defendant.⁷⁹ Whether com-

⁷⁸ *Cooley v. Minnesota Transfer Co.*, 53 Minn. 327, 55 N. W. 141; *Landa v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 31 S. W. 900; *Stiles v. Davis*, 1 Black, 101; *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 19 N. W. 72; *Illinois Cent. Ry. Co. v. Cobb*, 48 Ill. 402; *Locke, Attachm.* 32.

EXEMPT AS PUBLIC AGENTS: In holding a railway company not liable to garnishment for cars received of a connecting line under the running arrangements existing between them to avoid unloading and transfer of goods at point of connection, the Illinois court of appeals said: "It has long been held that a common carrier exercises a public employment, the duties and liabilities pertaining to which are clearly defined and regulated by law. A common carrier is bound to serve the public fairly and without unjust discrimination, and to receive, transport, and deliver freight when offered with reasonable dispatch. * * * In the absence of express contract, nothing can excuse it for nondelivery at the point of destination of the goods received except the act of God or the public enemy. We are unable to perceive why, substantially, the same considerations of public policy which exempt other public officers and agents in the discharge of their official duties from the operation of the statutes in relation to garnishment may not also be extended to the case of common carriers whenever the application of the statute will manifestly and necessarily interfere with the proper discharge on the part of the carrier of its public duties and functions." *Michigan Cent. Ry. Co. v. Chicago & M. L. S. Ry. Co.*, 1 Ill. App. 399.

⁷⁹ *Walker v. Detroit, G. H. & M. Ry. Co.*, 49 Mich. 446, 13 N. W. 812.

SHIPPING BILLS—OWNERSHIP—TRANSFERS: "While, in the absence of any other directions, goods are generally deliverable to the consignee, yet it is a frequent occurrence that bills of lading and consignment are transferred to third persons in the ordinary course

mon carriers may be compelled to respond as garnishees for goods of the defendant in their possession, and in actual transit, at the time the garnishment process was served, has been very seriously doubted; and by the weight of authority the proceedings cannot be sustained in such cases.⁸⁰

of business, and the carrier must recognize such transfers. It is also a matter of every-day practice to make consignments to factors and agents. Unless protected by proper vouchers, a carrier cannot assume to deal with consignments as, in all cases, actually and beneficially belonging to the consignee." *Walker v. Detroit, G. H. & M. Ry. Co.*, *supra*.

When a carrier was summoned as garnishee in a suit against the consignor of goods held by it for transportation, it was held the presumption is that they are the property of the consignee. *Bingham v. Lamping*, 26 Pa. St. 340, 67 Am. Dec. 418. Compare *Wells v. American Exp. Co.*, 55 Wis. 23, 11 N. W. 537.

THE RIGHT OF STOPPAGE IN TRANSITU is not extinguished or impaired by a service of process of garnishment in a suit against the consignee upon the carrier of the goods. *Chicago, B. & Q. Ry. Co. v. Painter*, 15 Neb. 394, 19 N. W. 488.

⁸⁰ *Illinois Cent. Ry. Co. v. Cobb*, 48 Ill. 402; *Montrose Pickle Co. v. Dobson & H. M. Co.*, 76 Iowa, 172, 40 N. W. 705; *Western Ry. Co. v. Thornton*, 60 Ga. 300; *Pennsylvania Ry. Co. v. Pennock*, 51 Pa. St. 244; *Michigan Cent. Ry. Co. v. Chicago & M. L. S. Ry. Co.*, 1 Ill. App. 399.

PROPERTY IN TRANSIT OUT OF STATE: "We therefore hold (and it is all we decide in this case) that property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons." *Stevenson v. Eastern Ry. Co. (Minn.)* 63 N. W. 256.

LEADING CASES EXEMPTING CARRIERS: "We think, when the legislature gave the garnishee process in an ordinary action upon contract before judgment, and where there is no allegation of any fraudulent attempt on the part of the debtor to defraud his creditors, it could not have contemplated that it would be used for the purpose of interfering with the business of railroads and other common carriers in the prompt performance of their duties to the public; and

Infants, Lunatics, and Married Women.

§ 38. Upon principle, the question whether persons under legal disability can be charged as garnishees would seem to find an answer in the answer to the

when the plaintiff, upon allegations of fraud, proceeds by writ of attachment against the property of his debtor, he should take the risk of the actual seizure of the defendant's property if found in the hands of the carrier, and assume the risk as well as the expense of establishing the ownership of the property by the defendant, and not be allowed to cast that risk and expense upon the carrier by summoning him as garnishee. * * * We approve what was said by Chief Justice Breese in the case of *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402, about the injustice of holding the common carrier as garnishee in respect to property in actual transit, viz: 'They are obliged, under ordinary circumstances, to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies in which they have no interest, and the burden, annoyance, and expense of which they must bear. When the goods are in the depot of a railway company in the county in which the attachment proceedings are instituted, there could, perhaps, be no objection to such process; but on this point we express no definite opinion. When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such process merely because it had received to be carried that which the law compelled them to receive and carry.' " *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 308, 19 N. W. 72.

CONTRA: "The parties summoned as trustees were an express company. In the superior court, 'upon motion to discharge them as trustees, it appeared that they, as common carriers, had taken a package securely sealed up, containing money, and directed to a person of the same name as the defendant, at Norwich, Connecticut.' * * * Upon the trial of an issue upon additional allegations filed by the plaintiff, it was proved that the person to whom the package was

question: Could the defendant maintain an action against them for the matter for which they are sought to be charged? Though the decisions upon the question are few, that is probably the true test.⁸¹

addressed was in fact the defendant. * * * They are therefore chargeable as trustees, unless the fact that the money was in their hands as common carriers, in transitu, exonerates them. There is no reason why a common carrier should not be liable to the trustee process in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a nondelivery of the goods at their place of destination. But we are of opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law that a carrier is responsible for all losses, except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no loss, but the defendant's property has been sequestered by the law, to be applied to his use and benefit. Every man holds his property subject to be attached; and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express or implied, to deliver it to the owner. The law substitutes the delivery to its officers for a performance of his contract." *Adams v. Scott*, 104 Mass. 164.

INTERSTATE COMMERCE: Where a consignment of merchandise has been removed from a consignor's place of business, and is in a carrier's yards, awaiting shipment, it is not in transit, so as to prevent garnishment of it; and statutes allowing such garnishment are not attempts to regulate interstate commerce. *Landa v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 31 S. W. 900.

PRIVATE CARRIERS: Of course, the principles invoked to exempt common carriers from liability to garnishment have no application to private carriers. *Elser v. Rommel*, 98 Mich. 74, 56 N. W. 1107.

⁸¹ INFANTS: "It would seem, if there is an attempt to charge him [the infant] upon the ground of having in his hands the credits of the principal debtor, that the plea of infancy should avail the trustee equally as if sued directly by the principal debtor; but, if the minor is liable to the principal debtor for necessaries, no good reason is perceived why he may not be charged as his trustee to the extent of such liability, by means of the trustee process. So, if he has the

Plaintiffs.

§ 39. Can the plaintiff in the main action be made a garnishee? The leading case upon this question in America (1816) is *Graighle v. Notnagle*,⁸² in which Judge Washington, in a well-considered opinion, held, in accordance with the decisions under the custom in London, that he may be. The following is from the opinion in this case: "The absurdity of process issuing

specific goods and chattels of the principal debtor in his hands, we see no sufficient reason why they should not be reached by the trustee process. * * * The general words of the statute include minors, though it is true the court might, upon sufficient reasons, restrain these general words by holding that minors did not come within the equity of the statute. But we do not apprehend that there is any good reason for restraining these general words. * * * But a minor, when sued, is not capable of conducting the suit; and it is necessary that he should defend by guardian in a trustee process, so long as he is a minor, as in other cases. To give the trustee process the effect of an attachment of the goods against the minor from the date of the service, his guardian, if he had one, should have been cited in. If this is not done, the plaintiff must, at his peril, apply to the court to have a guardian ad litem appointed." *Wilder v. Eldredge*, 17 Vt. 226, approved in *Secfield v. White* (1857) 29 Vt. 330.

LUNATICS: The husband being appointed guardian ad litem of the garnishee, her default was set aside. "The court was entirely right in opening the default, and allowing the garnishee defendant to answer. Such a course was the only proper one when it appeared, as it did without dispute, that the garnishee was insane when the summons was served on her." *Bond v. Neuschwander*, 86 Wis. 391, 57 N. W. 54.

MARRIED WOMEN: Where a married woman could not be sued without her husband's consent, it was held that she could not be charged as his garnishee. *Delacroix v. Hart*, 24 La. Ann. 141. In Maryland, though it is there held that a married woman cannot maintain an action at law against her husband, yet he may be charged as her garnishee. *Odend'hal v. Devlin*, 48 Md. 439.

⁸² 1 Pet. C. C. 245, Fed. Cas. No. 5,679.

against the plaintiff in the attachment at his own suit, his answering his own interrogatories, and being subject to execution for a debt due to himself, are strongly relied upon to prove that an attachment cannot be laid in the hands of the plaintiff in that suit. * * *

The law is remedial, and the words of it general, extending the remedy to all creditors without distinction; and it would seem strange that the only person who cannot obtain justice against a nonresident should be one who has in his hand the fund out of which that satisfaction may be had. There would seem to be manifest injustice that the plank upon which he might save himself, and upon which he may probably have relied, should be taken from him, and given to other creditors. * * *

The effect of the suit might be defeated, unless the plaintiff were armed with coercive measures against the garnishee. He certainly cannot be required to use those measures, whether they are necessary or not. * * *

No reason is perceived why the plaintiff may not proceed to obtain judgment against the defendant, and after that [cause] an execution to be levied on the property attached. * * *

If the plaintiff, instead of having property in his own hands belonging to the defendant, is indebted to him, no necessity is perceived for any further proceedings, * * *

unless, perhaps, it may be proper to enter a judgment, that the plaintiff have execution of the sum attached, and retain the same in his hands. * * *

That a creditor may lay a foreign attachment in his own hands, according to the custom of London, is clearly established.⁸³ * * *

⁸³ Citing *Rast. Ent.* p. 156; *Paramour v. Pain*, *Cro. Eliz.* 508; *Coke v. Brainforth*, *Cro. Eliz.* 830; *Morris v. Ludlam*, 2 *H. Bl.* 362; 4

It is not perceived that any injustice is done to the defendant in the attachment, or that the laws of the state of Pennsylvania or any general principle of law are violated by this mode of proceeding. * * *

Upon the whole, the court feels itself authorized to sustain the foreign attachment, which is laid in the hands of the plaintiff; and I am satisfied that in doing so we not only fulfill the spirit and intention of the law, but sanction a practice both just and convenient." This holding has been followed by the decisions of most of the states in which the question has since arisen.⁸⁴ However, some courts hold that the plaintiff cannot garnish himself,⁸⁵ either in his individual or representative capacity;⁸⁶ and that one of several plaintiffs cannot be charged as garnishee.⁸⁷

Defendants.

§ 40. Ordinarily, all the advantages of a garnishment against the defendant could be more effectually

Rolle, Abr. 554; 1 Com. Dig. 442; 7 Vin. Abr. 236; 2 Lutw. 1052-4. See, also, Sarg. Attachm. 72.

⁸⁴ Boyd v. Bayless, 4 Humph. (Tenn.) 386; Lyman v. Wood, 42 Vt. 113; Norton v. Norton, 43 Ohio St. 509, 3 N. E. 353; Coble v. Nonenaker, 78 Pa. St. 501; Grayson v. Veeche, 12 Mart. (La.) 688, 13 Am. Dec. 384; Richardson v. Gurney, 9 La. 285.

See, also, the following cases, in which the question is discussed, but not decided: Woodbridge v. Holmes, 78 Ala. 568; Beach v. Fairbanks, 52 Conn. 172; Willing v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17,767; Albert v. Albert, 78 Md. 338, 28 Atl. 388; New England Screw Co. v. Bliven, 3 Blackf. (Ind.) 240.

⁸⁵ Knight y. Clyde, 12 R. I. 119; dictum, Courtney v. Carr, 6 Iowa, 238, 245.

⁸⁶ Hoag v. Hoag, 55 N. H. 173.

⁸⁷ Blaisdell v. Ladd, 14 N. H. 130; Belknap v. Gibbens, 13 Metc. (Mass.) 471.

enforced by execution, and a garnishment against him would be a mere idle ceremony. Therefore, the question whether it is permissible to make the principal defendant a garnishee is not apt to arise frequently; and for the same reason it has been held that, in an action against several persons liable jointly, the plaintiff could not have one of their number made garnishee;⁸⁸ and that, when money is due an executor from the estate he represents, he cannot be charged as garnishee as executor in a suit against him individually.⁸⁹

Husband or Wife of the Defendant.

§ 41. By the weight of authority, the fact that the person indebted to the defendant or possessing his or her property is the husband⁹⁰ or wife⁹¹ of such defendant is no reason why such person should not be charged as garnishee in the suit. The statutes of most of the states provide, in substance, that the husband

⁸⁸ *Bailey v. Lacey*, 27 La. Ann. 39; *Richardson v. Lacey*, 27 La. Ann. 67.

⁸⁹ *Shepherd v. Bridenstine*, 80 Iowa, 225, 45 N. W. 746. *Contra*, *Dudley v. Falkner*, 49 Ala. 148.

⁹⁰ Held that, although a woman could not sue her husband, he may be charged as garnishee in a suit against her. *Odend'hal v. Devlin*, 48 Md. 439.

"Whether the trustee process could have been maintained while the relation of husband and wife existed need not be decided. See *Robinson v. Trofitter*, 109 Mass. 478. This is no reason why it should not be maintained after this relation has been dissolved by a divorce." *Porter v. Wakefield*, 146 Mass. 25, 14 N. E. 792.

⁹¹ *Jones v. Roberts*, 60 N. H. 216; *Enneking v. Scholtz*, 69 Iowa, 473, 29 N. W. 422.

Where a married woman could not be sued unless authorized by her husband or the judge of the court, it was held that she could not be made his garnishee. *Delacroix v. Hart*, 24 La. Ann. 141.

cannot be a witness against the wife, nor the wife against the husband, without the consent of the other; and these statutes have presented the most serious impediments to proceedings of this nature. In Iowa it was held that this statute did not prevent examining such a garnishee concerning the property of the defendant in her possession or her indebtedness to him.⁹² The contrary was held by the supreme court of Michigan.⁹³

Officers and Agents of Defendant Corporation.

Not Garnishable in Suits against Corporation.

§ 42. There is a hopeless conflict of the decisions on the question whether in actions against corporations the officers and agents of the defendant may be summoned and charged as garnishees in respect to its property, which they hold as officers and agents. On the one hand, it is argued that garnishees must be third persons, and that these officers and agents, when acting as such, are not third persons, but the corporation itself; that they are the very hands of the company; that it can do no business except through them; and that their possession is its possession. Moreover, if the process were allowed in such cases, it would often effectually prevent corporations from doing business, and is therefore against public policy. Under

⁹² Thompson v. Silvers, 59 Iowa, 670, 13 N. W. 854. See, also, Petition of O'Brien, 24 Wis. 547; Lockwood v. Worstell, 15 Abb. Prac. (N. Y.) 430, note.

⁹³ Berles v. Adsit Circuit Judge, 102 Mich. 495, 60 N. W. 967, citing De Farges v. Ryland, 87 Va. 404, 12 S. E. 805; Niland v. Halish, 37 Neb. 47, 55 N. W. 295. See, also, Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295.

this view, it has been held that a ticket agent of a railroad company employed to sell tickets could not be charged as garnishee in a suit against the company,⁹⁴ and that the president of a railroad company could not be charged as its garnishee.⁹⁵ There are several reported cases in which it has been attempted to charge as garnishee the treasurer of the defendant corporation, and in which it has been held that it could not be done.⁹⁶

Contra.

§ 43. On the other hand, it is said that it would be easy for corporations to avoid payment of their debts if placing their property in the hands of their officers were placing it beyond the reach of their creditors; that the officer is to be regarded as an individual having property of the corporation in his possession, and that the fact that he happens at the same time to be an officer of the corporation is no excuse for not surrendering the property, or answering for it when summoned as garnishee; that it is not reasonable to require creditors to proceed by the tedious process of sequestration; and, if any other creditor or stockholder of the company object, he may file a complaint, and proceed to a final settlement of the affairs of the com-

⁹⁴ *Fowler v. Railway Co.*, 35 Pa. St. 22; *Pettingill v. Androscoggin Ry. Co.*, 51 Me. 370.

⁹⁵ *Wilder v. Shea*, 13 Bush (Ky.) 128.

⁹⁶ *Sprague v. Steam Nav. Co.*, 52 Me. 592; *Lewis v. Smith*, 2 Cranch, C. C. 571, Fed. Cas. No. 8,332; *Bowker v. Hill*, 60 Me. 172; *McGraw v. Memphis & O. Ry. Co.*, 5 Cold. (Tenn.) 434; *Mueth v. Schardin*, 4 Mo. App. 403.

Money which city officers had no authority to bank with the city depositary may be garnished in the bank on a judgment against the city. *Murphree v. City of Mobile (Ala.)* 18 South. 740.

pany. Moreover, that the argument that the possession of the agent is the possession of the principal would apply with as much force in suits against natural persons as in suits against corporations, and, when carried to its logical limits, would in many cases effectually destroy the remedy designed by the legislature, and is therefore unsound. Under this view, it has been held that the president of a bank may be charged as garnishee in a suit against the bank;⁹⁷ that the president of a railroad,⁹⁸ or the cashier and paymaster of a railroad,⁹⁹ or a local station ticket agent of a railroad,¹⁰⁰ or a tollgate keeper of a turnpike company,¹⁰¹ may be charged as garnishee in a suit against the company whose officer or agent he is.

⁹⁷ *Balston Spa Bank v. Marine Bank*, 18 Wis. 490.

⁹⁸ *First Nat. Bank v. Davenport Ry. Co.*, 45 Iowa, 126.

⁹⁹ *Everdell v. Sheboygan & F. du L. Ry. Co.*, 41 Wis. 395.

¹⁰⁰ *Littleton Nat. Bank v. Portland & O. Ry. Co.*, 58 N. H. 104.

¹⁰¹ *Central Plank-Road Co. v. Sammons*, 27 Ala. 380.

CHAPTER III.

LIABILITY OF GARNISHEE—HOW DETERMINED.

- § 44. Fundamental Principles—Garnishee Chargeable Only When Indebted to or Holding Property of Defendant.
45. — Neither Defendant nor Garnishee can Defeat Garnishment Once Attached.
46. — Plaintiff Acquires Defendant's Rights.
47. — Garnishee not Chargeable because of Liability to Plaintiff or to Defendant as Trustee.
48. — Garnishee's Position, Rights, and Defenses not Improved or Impaired.
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51. Statutory Terms.
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64. — When Liable for Part Performance.
65. — Contracts Made after Garnishment.
66. Assignments of the Garnished Property or Debt—Garnishment. Defeated by Prior Transfer.
67. — Garnishee's Notice of Assignment.
68. — Assignment without Notice to Assignee.
69. — Splitting up Demands.

- § 70. Orders, Checks, and Drafts as Assignments of the Fund Drawn on—An Equitable Assignment of Amount of Order.
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72. — Payee Has No Rights till Order is Accepted.
73. What is Assignable—Future Wages and Debts to Accrue—Things Having No Existence.
74. — Wages to be Earned under Existing Employment.
75. Invalid and Fraudulent Assignments—Bona Fides may be Tried in Garnishment.
76. — Plaintiff may Recover though Defendant could not.
77. — No Matter Who Claims to Own It.
78. — Pleadings—Proofs—Defenses.
79. — Fraud a Question of Fact.
80. — Badges of Fraud.
81. — Facts Raising Conclusive Presumption of Fraud.

Fundamental Principles.

Garnishee Chargeable Only When Indebted to or Holding Property of Defendant.

§ 44. In order to render the garnishee liable to the plaintiff in garnishment, it must appear that he has property belonging to the defendant in his possession or under his control, or that he is indebted to the defendant.¹

¹ See post, § 50; *Victor v. Hartford Fire Ins. Co.*, 33 Iowa, 210; *Stickney v. Crane*, 35 Vt. 89; *Galena & S. W. Ry. Co. v. Stahl*, 103 Ill. 67; *Carson v. Allen*, 2 Chand. (Wis.) 123; *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390; *Keyes v. Milwaukee & St. P. Ry. Co.*, 25 Wis. 691; *Putney v. Farnham*, 27 Wis. 187; *Balliet v. Scott*, 32 Wis. 174; *Henry v. Bew*, 43 La. Ann. 476, 9 South. 101; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Cross v. Brown* (R. I.) 33 Atl. 147, 156.

A mortgagee not being in possession cannot be charged as garnishee of the mortgagor. He is not indebted to him, and not in possession of his property, and therefore not liable. See post, §§ 52, 175.

At execution sale, K. agreed with defendant and certain creditors to buy the property in, and sell it again at private sale, and with the proceeds repay himself cost and expense, then pay F. and C. their

Neither Defendant nor Garnishee can Defeat a Garnishment Once Attached.

§ 45. If he is indebted to the defendant or in possession of his property, he is chargeable to that extent;² and, his liability having once become fixed by proper proceedings, he cannot defeat it by any subsequent act;³ nor can the defendant accomplish the same result by going into bankruptcy,⁴ or by making an assignment of all his property for the benefit of his creditors,⁵ or in any other manner.⁶

claim, then turn over residue to defendant or other creditors. There was no residue, and the garnishee was not chargeable. *Shoemaker v. Katz*, 74 Wis. 374, 43 N. W. 151.

Held, that garnishee is not chargeable in such a case, though he make \$500 over his own debt. *Dowdall v. Wisher*, 167 Pa. St. 475, 31 Atl. 749.

Defendant agreed to put new boiler in garnishee's mill, and take old boiler in part pay, or, if garnishee sold old boiler before job was done, then garnishee to pay \$225 in lieu of it. The title to the old boiler not having passed, and nothing being due in cash till the job was done, except what was already paid, the garnishee was not chargeable. *Edwards v. Roepke*, 74 Wis. 571, 43 N. W. 554.

DEBT DUE THIRD PARTY LIABLE TO PLAINTIFF: Garnishee cannot be charged for property belonging to a brother of the principal defendant, liable jointly with him to the plaintiff, but not a party to the main action. *Allison v. Chicago, B. & Q. Ry. Co.*, 76 Iowa, 209, 40 N. W. 813.

² *Beck v. Cole*, 16 Wis. 100; *Schuerman v. Foster*, 82 Wis. 319, 52 N. W. 311. See, also, post, §§ 52-59.

³ See post, §§ 192, 193.

⁴ *Krupp v. Tabor*, 31 Mich. 174. Compare *Bates v. Tappan*, 99 Mass. 376; *Peck v. Jenness*, 7 How. 612.

⁵ *Stein v. La Dow*, 13 Minn. 412 (Gil. 381); *Fairbanks v. Whitney*, 36 Minn. 305, 30 N. W. 812; *Maxfield v. Edwards*, 38 Minn. 539, 38 N. W. 701; *Coleman v. Darling*, 66 Wis. 158, 28 N. W. 367; *Thomas v. Brown*, 67 Md. 512, 10 Atl. 714.

In some of the states the statute provides that an assignment made

⁶ See following page.

Plaintiff Acquires Defendant's Rights.

§ 46. Unless the garnishee holds by conveyance in fraud of the defendant's creditors, the plaintiff's right to have the garnishee charged for any property or debt depends upon and is measured by the garnishee's liability to the principal defendant. The plaintiff steps into the defendant's shoes, and acquires his rights, no more and no less,⁷ except that the garnishee may be summoned in respect to claims upon which the defend-

within a certain time after the garnishment shall vacate it. See *Fairbanks v. Whitney* and *Thomas v. Brown*, above.

Such was the law in case of bankruptcy within four months after garnishment, and before lien acquired "under final process." *Howe v. Union Ins. Co.*, 42 Cal. 528.

⁶ *Judd v. Littlejohn*, 11 Wis. 176; *Kelly v. Dill*, 23 Minn. 435; *Ellis v. Goodnow*, 40 Vt. 237; *Leslie v. Merrill*, 58 Ala. 322; *Sturtevant v. Robinson*, 35 Mass. 175; *Gerry v. Remick (Me.)* 5 Atl. 268; *Harris v. Hutcheson*, 65 Miss. 9, 3 South. 34; *Minthorn v. Hemphill*, 73 Iowa, 257, 34 N. W. 844; *Garland v. Sperling (N. M.)* 30 Pac. 925; *Bell v. Wood*, 87 Ky. 56, 7 S. W. 550; *Gause v. Cone*, 73 Tex. 239, 11 S. W. 162.

⁷ *Fitzgerald v. Hollingsworth*, 14 Neb. 188, 15 N. W. 345; *St. Louis v. Regenfuss*, 28 Wis. 144; *Healey v. Butler*, 66 Wis. 16, 27 N. W. 822; *Goode v. Barr*, 64 Wis. 659, 26 N. W. 114; *Foster v. Singer*, 69 Wis. 392, 34 N. W. 395; *Dawson v. Iron Range & H. B. Ry. Co.*, 97 Mich. 33, 56 N. W. 106; *Fogler v. Marston*, 83 Me. 396, 22 Atl. 249; *Kettle v. Harvey*, 21 Vt. 301; *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675; *Gage v. Chesebro*, 49 Wis. 486, 492, 5 N. W. 881; *Rock Island Lumber & Manuf'g Co. v. Equitable Trust & Inv. Co.*, 54 Kan. 124, 37 Pac. 984; *McKelvey v. Crockett*, 18 Nev. 238, 2 Pac. 386; *Smith v. Clarke*, 9 Iowa, 241, 245; *Victor v. Hartford Fire Ins. Co.*, 33 Iowa, 210; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Williams v. Housel*, 2 Iowa, 156; *U. S. v. Robertson*, 5 Pet. 641, 659; *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 717; *Todd v. Hall*, 10 Conn. 544, 556; *Smith v. Millett*, 11 R. I. 528, 533; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104.

"The circuit court found that the plaintiff was not entitled to recover from the garnishee said \$500. The third finding is: 'I do not

ant has already brought suit,⁸ or which are not payable till some future date;⁹ and the want of previous demand, without which the defendant could not maintain an action, will not prevent the garnishee being charged.¹⁰ The plaintiff stands upon the defendant's right, and is in no better condition than the latter would be if he were prosecuting the suit.¹¹

decide the question of liability as to the said sum of \$500 between the said Eau Pleine Lumber Company [defendant] and the said H. D. McCulloch [garnishee]. * * * The circuit court refused to find the only material fact in the case." *Felch v. Eau Pleine Lumber Co.*, 58 Wis. 433, 17 N. W. 397.

ASSIGNMENTS VOIDABLE BY DEFENDANT: Though an assignment by an infant be voidable, one attempting to reach the property assigned by suit against him and garnishment cannot avoid it. *Kingman v. Perkins*, 105 Mass. 111.

⁸ See post, § 144.

⁹ See post, § 126.

¹⁰ *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520; *Corey v. Powers*, 18 Vt. 588; *Webster Wagon Co. v. Peterson*, 27 W. Va. 314; *Thayer v. Sherman*, 12 Mass. 441; *Woodbridge v. Morse*, 5 N. H. 519; *Quigg v. Kittredge*, 18 N. H. 137; *Riley v. Hirst*, 2 Pa. St. 346; *Mann v. Buford*, 3 Ala. 312, 37 Am. Dec. 691; *Staples v. Staples*, 4 Me. 532; *Atwood v. Dumas*, 149 Mass. 167, 21 N. E. 236.

SAVINGS DEPOSITS: Though the defendant could not sue for amount of his savings deposit in a bank until after demand and a week's notice and production of pass book or evidence of its loss, the deposit may be garnished. *Nichols v. Scofield*, 2 R. I. 123; *Maloney v. Casey* (Mass.) 41 N. E. 104. Compare *Clapp v. Hancock Bank*, 1 Allen, 394; *Kinsloe v. Davis*, 167 Pa. St. 519, 31 Atl. 934.

¹¹ *Harris v. Phoenix Ins. Co.*, 35 Conn. 310, 313; *Richardson v. Lester*, 83 Ill. 55; *Dressor v. McCord*, 96 Ill. 389; *Waldron v. Wilcox*, 13 R. I. 518; *Brown v. Collins* (R. I.) 27 Atl. 329; *Bay City Brewing Co. v. McDonell* (Mich.) 64 N. W. 12; *Oregon R. & N. Co. v. Gates*, 10 Or. 514; *Meier v. Hess*, 23 Or. 599, 32 Pac. 755; *Edson v. Sprout*, 33 Vt. 77; *Smith v. Stratton*, 56 Vt. 362; *Lomerson v. Huffman*, 25 N. J. Law, 625; *Myer v. Liverpool, L. & G. Ins. Co.*, 40 Md. 595; *Lewis v. Smith*, 2 Cranch, C. C. 571, Fed. Cas. No. 8,332; *Pundt v. Clary*, 13 Neb. 406, 14 N. W. 167; *Fitzgerald v. Hollingsworth*, 14 Neb. 188, 15

Garnishee not Chargeable for Debts or Property Belonging to Plaintiff or to Defendant as Trustee.

§ 47. The plaintiff cannot recover on the ground that the garnished property or debt belongs to himself, and not to the defendant; for, if that is so, it shows that the garnishee had no debt or property in his hands belonging to the defendant, if it shows anything, and

N. W. 345; *Perea v. Colorado Nat. Bank* (N. M.) 27 Pac. 322; *Union Pac. Ry. Co. v. Gibson*, 15 Colo. 299, 25 Pac. 300; *Marks v. Anderson*, 1 Colo. App. 1, 27 Pac. 168; *Hallowell v. Leafgreen*, 3 Colo. App. 22, 32 Pac. 79; *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 6 S. W. 825; *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. 777; *Starr v. Carrington*, 3 Conn. 278; *Kansas Inv. Co. v. Jones* (Kan. App.) 42 Pac. 935; *Dix v. Cobb*, 4 Mass. 508; *Doyle v. Gray*, 110 Mass. 206; *Phipps v. Rieley*, 15 Or. 494, 16 Pac. 185; *Shaver Wagon & Carriage Co. v. Halsted*, 78 Iowa, 730, 43 N. W. 623; *Meek v. Briggs*, 87 Iowa, 610, 54 N. W. 456; *Des Moines Cotton-Mill Co. v. Cooper* (Iowa) 61 N. W. 1084; *Lackett v. Rumbaugh*, 45 Fed. 23, 28; *The Olivia A. Carrigan*, 7 Fed. 507; *Fenton v. Block*, 10 Mo. App. 536; *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259.

RIGHTS AGAINST ASSIGNEE: "It is a fundamental principle that an attaching creditor can stand on no better footing, as against bona fide purchasers or assignees of his debtor, than the latter does at the time of the attachment or garnishment." *Dorestan v. Krieg*, 66 Wis. 604, 613, 29 N. W. 576; *Copeland v. Manton*, 22 Ohio St. 398, 404; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896.

The garnishee is liable only when the defendant might have maintained an action against him. *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997. See, also, post, § 154.

JUDGMENT OR ACCOUNTING BETWEEN DEFENDANT AND GARNISHEE: The defendant having made a settlement of accounts with the garnishee, the plaintiff is bound thereby, in the absence of fraud. *Klauber v. Wright*, 52 Wis. 312, 8 N. W. 893; *Huntington v. Risdon*, 43 Iowa, 517.

A judgment in favor of the garnishee in a suit against him by the defendant is conclusive in his favor against the plaintiff (*Bateman v. Grand Rapids & I. Ry. Co.*, 96 Mich. 441, 56 N. W. 28), unless shown to be fraudulently or collusively obtained. *Palmer v. Gilmore*, 148 Pa. St. 48, 23 Atl. 1041. Compare *Church v. Simpson*, 25 Iowa, 408.

for these only can he be charged.¹² Recovery can be had only for debts or property which belong to the defendant in the character in which he is sued, and not for those which he owns in some other or representative capacity.¹³

¹² *Shattuck v. Smith*, 16 Vt. 132; *Johnson v. Brant*, 38 Kan. 754, 17 Pac. 794; *Lawrence v. McKenzie*, 88 Iowa, 432, 55 N. W. 505.

The plaintiff cannot treat the property as sold in his transactions with the defendant, and treat it as not sold in his dealings with the garnishee and claimant. *Klocow v. Patten* (Iowa) 61 N. W. 926.

A mortgagee who has sold the mortgaged property, and paid his claim with the proceeds, cannot be charged as garnishee of the mortgagor, on the ground that the plaintiff's demand is for a credit extended to the defendant in reliance upon a representation by the mortgagee that his mortgage had been paid. *Sears v. Thompson*, 72 Iowa, 61, 33 N. W. 364.

¹³ *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675; *Clark v. Shrader*, 41 Iowa, 491; *Des Moines Cotton-Mill Co. v. Cooper* (Iowa) 61 N. W. 1084; *Lessing v. Vertrees*, 32 Mo. 431; *Blake Crusher Co. v. Town of New Haven*, 46 Conn. 473; *Boyden v. Ward*, 38 Vt. 628; *Cram v. Shackleton*, 64 N. H. 44, 5 Atl. 715; *Hitchcock v. Galveston Wharf Co.*, 50 Fed. 263; *McArthur v. Garman*, 71 Iowa, 34, 32 N. W. 14; *Davis v. Willey*, 57 Vt. 125. See, also, post, § 57.

In a suit against an administrator as such, a debt due the decedent may be garnished. *Harmon v. Osgood*, 151 Mass. 501, 24 N. E. 401. Contra, *Boyden v. Ward*, 38 Vt. 628.

It was held in an early case that money due on a note to an executor could be garnished in a suit against him personally, because he could sue for such money only in his individual capacity. *Coburn v. Ansart*, 3 Mass. 319. But see *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566.

PUBLIC FUNDS deposited in the face of a law prohibiting it are thereby converted by the depositor, and the bank may be charged as his garnishee therefor. *First Nat. Bank v. Gandy*, 11 Neb. 431, 9 N. W. 566; *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280. Contra, *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675.

M. lent defendant money to buy goods, on agreement that he should be paid out of the proceeds. Defendant sold the goods to the gar-

Garnishee's Position, Rights, and Defenses not Improved or Impaired.

§ 48. The garnishee is not entitled to occupy in any respect a better position than if sued by the defendant.¹⁴ On the other hand, it is a universal rule that under no circumstances is the garnishee to be placed in a worse condition by operation of the proceedings against him than he would be in if the defendant's claim against him were enforced by the defendant himself.¹⁵ Any defense which would be good against the

nishee on credit, as agent of M., and the garnishee was not liable. *Mershon v. Moors*, 76 Wis. 502, 45 N. W. 95.

INSURANCE MONEY: Loss having occurred on a policy of insurance issued to the mortgagor, and payable to the mortgagee, "as his interest may appear," to which agreement the mortgagee is a party, he is entitled to the insurance money against one garnishing the same in a suit against the mortgagor. *Mansfield v. Stevens*, 31 Minn. 40, 16 N. W. 455; *Coykendall v. Ladd*, 32 Minn. 529, 21 N. W. 733; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 24 N. W. 407; *Edwards v. Agricultural Ins. Co.*, 88 Wis. 450, 60 N. W. 782.

¹⁴ *Allen v. Hall*, 46 Mass. 263; *Lawrence v. Security Co.*, 56 Conn. 423, 15 Atl. 406; *Hearn v. Crutcher*, 4 Yerg. (Tenn.) 461, 475; *Fifield v. Wood*, 9 Iowa, 249; *Toll v. Knight*, 15 Iowa, 370; *Caldwell v. Stewart*, 30 Iowa, 379; *Jones v. Tracy*, 75 Pa. St. 417; *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, 14 N. W. 343. But see *Armstrong v. Cowles*, 44 Conn. 44.

P., when summoned as garnishee of M. & Co., answered that, being indebted to M. & Co., he agreed verbally with M. to sell him a town lot for such debt and as much more cash. The agreement being void under the statute of frauds, the garnishee was properly charged. *Morgan v. McLaren*, 4 G. Greene (Iowa) 536.

A judgment, against a garnishee in favor of the defendant being conclusive between them, the garnishee cannot question the correctness of it in this proceeding. *Fuller v. Foote*, 56 Conn. 341, 15 Atl. 760.

The garnishee cannot defend on the ground that the money in his hands is for liquors sold by him as agent for the defendant, but in violation of law. *Thayer v. Partridge*, 47 Vt. 423.

¹⁵ *Gage v. Chesebro*, 49 Wis. 486, 492, 5 N. W. 881; *Rice v. Third*

latter is available against the plaintiff.¹⁶ He can never be charged in such a manner as to subject him to a double liability, unless from his own fault; nor if the judgment against him, as such, would not discharge his obligation pro tanto.¹⁷

The Facts as They Existed When the Summons was Served Determine the Liability.

§ 49. The garnishee is liable to the plaintiff for the amount of the property in his possession or under his

Nat. Bank, 97 Mich. 414, 56 N. W. 776; Smith v. Clarke, 9 Iowa, 241, 245; Fifield v. Wood, Id. 249; Cox v. Russell, 44 Iowa, 556, 562; Sauer v. Town of Nevadaville, 14 Colo. 54, 23 Pac. 87; Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997; Rock Island Lumber & Manuf'g Co. v. Equitable Trust & Inv. Co., 54 Kan. 124, 37 Pac. 983; Rice v. Whitney, 12 Ohio St. 358; Ellison v. Tuttle, 26 Tex. 283; Curtis v. Alvord, 45 Conn. 569; Pundt v. Clary, 13 Neb. 406, 14 N. W. 167; Johnson v. Geneva Pub. Co., 122 Mo. 102, 26 S. W. 676; Nutter v. Framingham & L. Ry. Co., 132 Mass. 427; Boston Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. 166, 19 Am. Dec. 266; Wile v. Cohn, 63 Fed. 759; Henry v. Wilson, 85 Iowa, 60, 51 N. W. 1157; Howe v. Hyer (Fla.) 17 South. 925.

"The service of the garnishment neither changed not interrupted the contractual relation existing between the Chicago Company and the St. Louis Company. The rights and equities existing, and to arise out of those contractual relations, were in no way terminated or defeated by that service. The legal operation and effect of the garnishment proceedings, and of the final order therein made, were only to impound what was legally and equitably due from the garnishee after the adjustment of the claims between the latter and the principal debtor, and place it beyond the control of the debtor, and subject to collection for the benefit of the attaching creditor." North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. 710, 716.

¹⁶ Schuler v. Isreal, 120 U. S. 506, 7 Sup. Ct. 648; Crossman v. Crossman, 21 Pick. 21; Daniels v. Clark, 38 Iowa, 556; Fairfield v. McNany, 37 Iowa, 75; Lackett v. Rumbaugh, 45 Fed. 23.

¹⁷ Hamilton v. Rogers, 67 Mich. 135, 34 N. W. 278; Hewitt v.

control belonging to the defendant, and for any indebtedness from him to the defendant at the time the summons is served.¹⁸ His liability cannot be made to extend to property that may come into his hands or indebtedness that may be created subsequent to that time.¹⁹ The liability or nonliability of the garnishee

Wagar Lumber Co., 38 Mich. 701; *Secor v. Witter*, 39 Ohio St. 218, 231; *Walters v. Washington Ins. Co.*, 1 Iowa, 405, 411; *Burton v. District Tp. of Warren*, 11 Iowa, 166; *Daniels v. Clark*, 38 Iowa, 556, 559; *Pierce v. Carleton*, 12 Ill. 358 54 Am. Dec. 405; *May v. Baker*, 15 Ill. 89; *Galena & C. U. Ry. Co. v. Menzies*, 26 Ill. 122, 148.

¹⁸ *Nash v. Gale*, 2 Minn. 310 (Gil. 265); *Ide v. Harwood*, 30 Minn. 191, 14 N. W. 884; *Beck v. Cole*, 16 Wis. 100; *Secor v. Witter*, 39 Ohio St. 218.

In Michigan it is held that, though there be an existing liability to defendant at the time the garnishment summons is served, yet the garnishee cannot be charged if, at the time the summons was issued, the liability had not yet been created. *Hitchcock v. Miller*, 48 Mich. 603, 12 N. W. 871; *Cogswell v. Mitts*, 90 Mich. 353, 51 N. W. 514.

The garnishee's liability dates from the service of the writ, not from the notice to answer. *Johnson v. Carry*, 2 Cal. 33.

When the owner of two judgments against the same person institutes garnishment on one, and, that being afterwards paid, has the same garnishee summoned in proceedings upon the other, the garnishee is liable on the second garnishment only for his obligations to the defendant when it was served. *Hoobaugh's Appéal*, 122 Pa. St. 88, 15 Atl. 669.

¹⁹ *Hitchcock v. Miller*, 48 Mich. 603, 12 N. W. 871; *Hopson v. Dinan*, 48 Mich. 612, 12 N. W. 875; *Bethel v. Judge of Superior Court*, 57 Mich. 379, 381, 24 N. W. 112; *Cogswell v. Mitts*, 90 Mich. 353, 51 N. W. 514; *Wood v. Wall*, 24 Wis. 647; *Easterly v. Keney*, 36 Conn. 18; *Morris v. Union Pac. Ry. Co.*, 56 Iowa, 135, 8 N. W. 804; *Thomas v. Gibbons*, 61 Iowa, 50, 15 N. W. 593; *Muzzy v. Lantry*, 30 Kan. 49, 2 Pac. 102; *Burlington & M. R. Ry. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622, 625; *Devries v. Summit*, 86 N. C. 126; *Gillette v. Cooper*, 48 Kan. 632, 30 Pac. 13; *Norris v. Burgoyne*, 4 Cal. 409; *Bliss v. Smith*, 78 Ill. 359; *Flemming v. Baxter* (Colo. App.) 38 Pac. 57.

CONTRA, largely by force of statute: *Palmer v. Noyes*, 45 N. H. 174; *Smith v. Boston, C. & M. Ry. Co.*, 33 N. H. 337; *Young v. First Nat.*

is determined solely with reference to the facts as they existed at the time the garnishment was served; no subsequent event can increase, diminish, or affect it,²⁰

Bank, 51 Ill. 73; Gause v. Cone, 73 Tex. 239, 11 S. W. 162; Glenn v. Boston & S. Glass Co., 7 Md. 287; Patterson v. Berry, 10 Abb. Prac. (N. Y.) 82, 5 Bosw. 518; Archer v. People's Sav. Bank, 88 Ala. 249, 7 South. 53; Craft v. Louisville & N. Ry. Co., 93 Ala. 22, 9 South. 328; Lady Ensley Furnace Co. v. Rogan, 95 Ala. 594, 11 South. 188; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46; Columbus Ins. & Banking Co. v. Hirsh, 61 Miss. 74; Seymour v. Cooper, 25 Vt. 141.

²⁰ Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201; Thorpe v. Preston, 42 Mich. 511, 4 N. W. 227; Bethel v. Judge of Superior Court, 57 Mich. 329, 24 N. W. 112; Gies v. Bechtner, 12 Minn. 279 (Gil. 183); Case Threshing Mach. Co. v. Miracle, 54 Wis. 298, 11 N. W. 580; Edwards v. Roepke, 74 Wis. 575, 43 N. W. 554; Foster v. Singer, 69 Wis. 392, 34 N. W. 395; McCown v. Russell, 84 Wis. 122, 127, 54 N. W. 31; Vollmer v. Chicago & N. W. Ry. Co., 86 Wis. 305, 56 N. W. 919; Williams v. Androscoggin & K. R. Co., 36 Me. 201, 8 Am. Dec. 742; Mace v. Herrald, 36 Me. 136; Sanford v. Bliss, 12 Pick. 116; Meacham v. McCorbitt, 2 Metc. (Mass.) 352; Hancock v. Colyer, 99 Mass. 187, 96 Am. Dec. 730; O'Brien v. Collins, 124 Mass. 98; Capen v. Duggan, 136 Mass. 501; Fitch v. Waite, 5 Conn. 117, 122; Grosvenor v. Farmers' & Mechanics' Bank, 13 Conn. 104; Garland v. Sperling (N. M.) 30 Pac. 925; Harris v. Hutcheson, 65 Miss. 9, 3 South. 34; Lockett v. Rumbaugh, 45 Fed. 23; Drake, Attachm. § 667, and cases there cited.

A Wisconsin statute made the liability in justice court depend upon the facts at the time judgment is rendered against the principal defendant. *Jones v. St. Onge*, 67 Wis. 524, 30 N. W. 927.

Held, that a liability contingent when the writ is served, but certain before the garnishee answers, may be reached. *Franklin Fire Ins. Co. v. West*, 8 Watts & S. (Pa.) 350.

LIMITATIONS OF THE RULE: "Shaw, C. J.: * * * It has been argued that the trustee's liability must depend upon the state of facts as it existed when the trustee process was served. This is not strictly correct. Some liability must exist at that time in order to charge him, but that liability may be greatly modified, and even discharged, by subsequent events. Suppose one indebted to the principal is summoned as trustee, but he has various liens upon the funds; as, for instance, to indemnify himself against suretyships and liabilities for

except that in case the property or debt garnished is delivered by an agent of the garnishee after service of the garnishment, but before knowledge of it has been or could be, by reasonable diligence, communicated to him, such delivery or payment discharges the garnishee.²¹ For the same reason, a garnishee cannot be charged for property in his possession or debts owed by him when served which he had no reason to suppose belonged to the defendant, and which he after-

the principal. These liabilities may all be discharged, and thus leave the fund subject to the attachment; or they may be enforced in whole or in part, and then the trustee will have a clear right to deduct from the fund the amount paid by him, in pursuance of liabilities which existed at the time of the service, and thus the fund may be diminished, or even wholly absorbed. A factor may have a large amount of goods of his principal, on which, however, he has a lien for his general balance. He may have received of his principal bills of exchange, which have gone forward, but of which the acceptance is uncertain. In this state he is summoned. He will not be chargeable for funds acquired after the service; but he may receive funds after the service, which will discharge and reverse the balance, and leave the fund liable to the trustee process; whereas, but for such acquisition of funds afterwards, the fund attached would be first liable to the factor's balance, which might thus absorb it. There are various modes, therefore, in which the question whether trustee or not, and for what amount, may be affected and decided by events occurring after the service of the process." *Smith v. Stearns*, 19 Pick. (Mass.) 20, 23. See, also, post, § 188; *Edgerton v. Martin*, 35 Vt. 116.

²¹ *Bates v. Chicago & N. W. Ry. Co.*, 60 Wis. 296, 19 N. W. 72; *Hamilton v. Rogers*, 67 Mich. 137, 34 N. W. 278; *Spooner v. Rowland*, 4 Allen, 485; *Robinson v. Hall*, 3 Metc. (Mass.) 301; *Williams v. Kenney*, 98 Mass. 142; *Jordan v. Jordan*, 75 Me. 100; *Landry v. Chayret*, 58 N. H. 89; *Farrell v. Pearson*, 26 Ill. 463.

If the fact of the garnishment was known, not so. *Conley v. Chilcote*, 25 Ohio St. 320.

The garnishee's agents are bound to take notice of the garnishment, and act accordingly. *Buchanan Co. Bank v. Cedar Rapids*, 1 F. & N. W. Ry. Co., 62 Iowa, 494, 17 N. W. 737; *Tindall v. Wall*, Busb. (N. C.) 3.

wards paid or delivered to another before receiving notice that the plaintiff seeks to reach it by his garnishment.²²

Grounds of Liability.

§ 50. The statutes authorizing garnishment proceedings all divide the grounds for charging the garnishee into two grand divisions, viz.: (1) As custodian of the defendant's property; and (2) as indebted to him.²³ All subsequent proceedings and inquiries must be confined to the ground set out when the proceedings are instituted.²⁴ Therefore, in all cases where there is any doubt as to which ground the proceedings should be planted on, it is always safer to allege both. In *Botsford v. Simmons*, above, Chief Justice Graves, in giving the opinion of the court, says: "This act allows a garnishee prosecution where the party to be garnished is claimed to hold one or both of two separate positions. * * * These

²² *Kauffman v. Jacobs*, 49 Iowa, 432; *Himpsted v. German Bank*, 46 Ark. 537; *German Bank v. Himpsted*, 42 Ark. 62. See, also, post, § 266.

When it is sought by the garnishment to reach property which the garnishee has no reason to suppose belongs to the defendant, a special notice of the fact should accompany the summons. *First Nat. Bank v. Leppel*, 9 Colo. 594, 13 Pac. 776. See, also, post, § 257.

²³ *Allen v. Hall*, 5 Metc. (Mass.) 263.

Under some of the statutes, the garnishee can be charged only as debtor. *Wood v. Edgar*, 13 Mo. 451; *Perea v. Colorado Nat. Bank* (N. M.) 27 Pac. 322; *Garland v. Sperling* (N. M.) 30 Pac. 925.

²⁴ *Botsford v. Simmons*, 32 Mich. 357; *Pratt v. Scott*, 19 Mo. 625; *Mitchell v. Shelton*, 35 Conn. 1; *Connor v. Third Nat. Bank*, 90 Mich. 328, 51 N. W. 523; *Lewis v. Smith*, 2 Cranch, C. C. 571, Fed. Cas. No. 8,332; *Nash v. Gale*, 2 Minn. 311 (Gil. 265). See, also, post, §§ 249, 256, 291. *Contra*, *Prince v. Heenan*, 5 Minn. 347 (Gil. 279).

grounds are distinct, and the party is never subject to be charged, and held upon one, when the process is confined to the other, unless it chance to happen, which must be very seldom, that the true condition of the matters in question is at the same time within the legal meaning of the second ground, and of some term of the first. An examination of the act will show that the legislature considered the distinction between the two grounds as one to be carefully observed in the management of the remedy. The distinction is plainly drawn in the first section, and the two grounds, although allowed to be joined, are nowhere confounded. The interlocutory proceedings, as well as the kind of judgment, are different in one case from what they are in the other.

* * * The basis of the particular case is therefore not to be departed from in the intermediate steps, or in the final determination.” Cases may arise in which it may be difficult to determine upon which ground to base the proceedings, though it may be certain that the garnishee is liable one way or the other.²⁵ It would seem to follow from what has been said that if the plaintiff, in his affidavit, alleges that the garnishee is indebted to the defendant, and the summons command him to appear and answer touching the property, money, and effects of the defendant in his custody, and nothing else, the suit must be a total miscarriage, for the garnishee cannot be questioned in regard to any ground of liability not stated in the affidavit, and he has not been summoned to answer to any ground therein stated.

²⁵ See post, § 125.

Statutory Terms.

§ 51. The terms used in many of the garnishment statutes to denote what property may be attached by garnishment are very general and sweeping, and do not seem to have been used with any very definite idea or intention as to what classes of property should be covered by each, but rather with the purpose of including by other terms every species of personal estate which might be considered not to be included in any one term used. The most common terms are property, money, goods, chattels, credits, and effects. Any one of these terms or the majority of them would seem to cover most of the ground alone. Thus, it is said that the term "effects" is equivalent to worldly substance or anything that can be turned to value.²⁶ The term "property" would seem to be almost as broad.²⁷ "Chattels" is broader than "goods," and indicates generally all kinds of property except real estate, while goods applies only to inanimate things, having a corporeal existence.²⁸ Yet it has been held that the phrase "goods and chattels," when used as a whole, does not include evidences of debt or rights of action.²⁹ The word "debt," as used in these statutes, may be said generally to mean an obligation payable in mon-

²⁶ *Hogan v. Jackson* (Eng. 1774) 1 Coop. 304. Compare *The Alpena*, 7 Fed. 361.

²⁷ *Banning v. Sibley*, 3 Minn. 389 (Gil. 282, 298); *Crone v. Braun*, 23 Minn. 239; *Ide v. Harwood*, 30 Minn. 191, 14 N. W. 884; *Stahl v. Webster*, 11 Ill. 511; *Black, Law Dict.* "Property."

²⁸ 2 Kent, Comm. 342.

²⁹ *Kirkland v. Brune*, 31 Grat. (Va.) 126.

ey,³⁰ for which the defendant may maintain an action in his own name,³¹ either now or at some future time.³²

What Kind of Possession is Sufficient to Charge the Garnishee.

Control must be Actual and Exclusive of Defendant.

§ 52. Mere constructive possession or the *jus disponendi* of property belonging to the defendant is not sufficient to render one liable as his garnishee therefor. Unless the property sought to be garnished is in the actual control of the garnishee, so that he can dispose of it at will, he cannot be charged.³³ For example, a mortgagee cannot be charged as garnishee of the mortgagor for the value of the mortgaged property above his lien upon it, the same being in the actual possession of the mortgagor.³⁴ And this is so though the garnishee took the conveyance merely for the purpose of defrauding defendant's creditors.³⁵ A flock of

³⁰ See post, § 117.

³¹ See post, § 154.

³² See post, § 126.

³³ *Andrews v. Ludlow*, 5 Pick. 28; *Grant v. Shaw*, 16 Mass. 341; *Nickerson v. Chase*, 122 Mass. 296; *Smalley v. Miller*, 71 Iowa, 80, 32 N. W. 187.

A., as a trustee for B., sold C. some railroad iron, reserving in himself the title and right to retake possession if not paid for. The rails were laid, and, after default in payment, A. was summoned as garnishee of B. Held, that he had no such possession of the iron as would make him chargeable. *Clarke v. Farnum*, 7 R. I. 174.

³⁴ *Central Bank v. Prentice*, 18 Pick. 396; *Curtis v. Raymond*, 29 Iowa, 52; *Callender v. Furbish*, 46 Me. 226; *Kiggins v. Woodke*, 78 Iowa, 34, 34 N. W. 789, and 42 N. W. 576; *Spitz v. Tripp*, 86 Wis. 25, 56 N. W. 330; *Folkerts v. Standish*, 55 Mich. 463, 21 N. W. 891.

³⁵ *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. 723; *Gut-*

sheep which the defendant and garnishee are driving onto public weighing scales is as much in the possession of the defendant as of the garnishee. The latter could not deal with it unobstructed by the former, and therefore is not chargeable as his garnishee therefor.³⁶ One whose possession is the defendant's possession, and who has no independent control, cannot be charged.³⁷

Actual Personal Possession not Necessary.

§ 53. But it is not necessary, in order to charge the garnishee, that he have actual possession of the property sought to be reached, provided it is in his power.³⁸ When the garnishee is in possession by his agent, he

terson v. Morse, 58 N. H. 529. Compare, Cleveland Co-op. Stove Co. v. Wilson, 80 Iowa, 697, 45 N. W. 897.

³⁶ Case v. Dewey, 55 Mich. 116, 20 N. W. 817; Gleason v. South Milwaukee Nat. Bank, 89 Wis. 534, 62 N. W. 519. Compare First Nat. Bank v. Davenport & St. P. R. Co., 45 Iowa, 120, 126.

COLLUSIVE COLORABLE POSSESSION: The defendant, having anticipated the approach of the sheriff to levy an attachment, executed a bill of sale of his stock to the garnishee, locked the store, and gave the key to the garnishee, who, in the presence of all parties, warned the sheriff not to touch the stock on pain of prosecution for trespass. Held, that the garnishee had sufficient possession to charge him. Sabin v. Michell (Or.) 39 Pac. 635.

³⁷ Hall v. Filter Manuf'g Co., 10 Phila. (Pa.) 370. See, also, ante, §§ 42, 43.

³⁸ Lane v. Nowell, 15 Me. 86; Morse v. Holt, 22 Me. 180; Bingham v. Lamping, 26 Pa. St. 340, 67 Am. Dec. 418; Mechanics' Sav. Bank v. Waite, 150 Mass. 234, 22 N. E. 915; Glenn v. Boston & S. Glass Co., 7 Md. 287.

PROPERTY IN BOND for storage in the United States custom house, though not subject to actual attachment by a state officer undertaking to take it out of the custom house, either by paying the duties or giving an export bond, may yet be reached by garnishing the consignees of the property, who could take it out of bond in

may properly be charged, the same as if he were in personal possession,³⁹ or such agent may himself be made the garnishee.⁴⁰

either of these modes, and are therefore in constructive control and possession. *Peabody v. Maguire*, 79 Me. 592, 12 Atl. 630.

Contractors for building a courthouse, having become involved, made an assignment to a bank of all money due or to become due from the county to them for work upon the courthouse, in consideration of certain accommodations and advances by the bank. Thereafter certain creditors of the contractors began suit, and had both the bank and the county summoned as garnishees. The court said: "One thing is certain,—either the county or the bank had the custody and control of the fund. We have therefore said that, in our opinion, the bank was the equitable custodian thereof, although it was not in its actual possession. It therefore follows that any right or lien which attached to such fund should be protected in a court of equity. * * * The bank therefore had the right to the actual custody of the fund, and we think *Burnett & Co.* obtained a lien on the fund in equity by the garnishee proceedings against the bank." *County of Des Moines v. Hinkley*, 62 Iowa, 637, 17 N. W. 915. To the same effect, see *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542, 10 S. W. 140.

LOGS IN BOOM: Owners of a private boom, having exclusive control of the same, may be charged as garnishees for logs of the defendant which they have received for safe-keeping, though they claim no lien for control over the logs. *Farmers' & Mechanics' Bank v. Wells*, 23 Minn. 475.

³⁹ *Childs v. Digby*, 24 Pa. St. 23; *McDonald v. Gillett*, 69 Me. 271; *Farrell v. Pearson*, 26 Ill. 463.

So held although the defendant himself was the agent. *Ward v. Lampson*, 6 Pick. 358. But see *Smalley v. Miller*, 71 Iowa, 90, 32 N. W. 187.

⁴⁰ GARNISHMENT OF BAILEE TO STRANGER TO SUIT: *Mathews v. Smith*, 13 Neb. 178, 12 N. W. 821; *Bragunier v. Beck & Corbett Iron Co.*, 41 Kan. 542, 21 Pac. 640; *Wile v. Cohn*, 63 Fed. 759; *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89 Iowa, 618, 57 N. W. 444.

A garnishment of the agent is a defense to a subsequent garnishment of the principal. *Wile v. Cohn*, 63 Fed. 759.

It also affords the agent a defense to an action against him by his principal. *Citizens' State Bank v. Council Bluffs Fuel Co.*, *supra*.

Right to Retain not Necessary.

§ 54. Nor is it necessary that the garnishee have any right to withhold the property from the defendant, nor to move or handle it, provided he has it in his power to do so. Thus, it was held that a garnishee was chargeable for the value of the contents of a large box which before the service of the garnishment he had permitted to be left in his storehouse for safe-keeping only, which he declined to be responsible for, and which he had allowed the defendant to remove after the garnishment summons was served.⁴¹

Privity of Contract with Defendant not Necessary.

§ 55. It is not necessary that the garnishee should hold property by virtue of any contract with the de-

⁴¹ Loyless v. Hodges, 44 Ga. 647.

SAFETY DEPOSIT companies are chargeable as garnishees for property deposited in their vaults for safe-keeping, and the court may require the company to open its vaults to enable the sheriff to levy upon their contents. U. S. v. Graff, 67 Barb. (N. Y.) 304. Contra: Bottom v. Clarke, 7 Cush. 487; Gregg v. Nelson, 1 Leg. Gaz. Rep. (Pa.) 128, 8 Phila. 91.

A peculiar decision under this head is found in Staniels v. Raymond, 4 Cush. 314. It was held that a garnishee cannot be charged because of the mere possession of property of the defendant without claim of right to hold it against the owner, because the statute makes him liable only for goods "intrusted or deposited." In this case the garnishee had taken a cow on agreement with defendant to purchase her if approved; but, before the time of trying, the cow had expired, and, before the service of the garnishment summons, he had informed the defendant of his intention not to purchase, and had delivered her to the defendant, who left her in garnishee's possession, where she was when the writ was served. It is believed that this case was never avowedly overruled, and that it has never been followed, although it has been frequently cited.

A garnishee is liable for articles of personal property in his possession belonging to the defendant, although such garnishee have no lien

fendant. He is chargeable, though he acquires it wrongfully, without the defendant's consent.⁴² He may be charged for property he received from a third person, who claims to own it.⁴³

Possession as Trespasser or Jailer.

§ 56. It has been held that one who is a mere trespasser cannot be charged as garnishee for the property acquired by his wrongful act.⁴⁴ The only good reason which can be assigned for such a holding is that, if it were permitted to charge garnishees for property held by them as trespassers, an inducement would be held out to persons to connive at trespasses to gain an unlawful advantage, and thus public peace and personal security would be jeopardized. For these reasons it has been held that sheriffs, jailers, etc., cannot be made garnishees for money or other

or claim on, or right to retain or exclusively use, the property, and no right to make any use of it longer than the defendant may choose to permit. *Brown v. Davis*, 18 Vt. 212; *Bragunier v. Beck & Corbett Iron Co.*, 41 Kan. 542, 17 Pac. 640. Compare, *First Nat. Bank v. Davenport & St. P. R. Co.*, 45 Iowa, 120; *Booth v. Gish*, 75 Iowa, 451, 39 N. W. 704.

⁴² *Sweet v. Brown*, 5 Pick. 178; *De Graff v. Thompson*, 24 Minn. 452; *Lucas v. Campbell*, 88 Ill. 447. Contra: *Huntoon v. Dow*, 29 Vt. 215; *Drake, Attachm.* § 485.

Concerning balances in the hands of officers of the law, see ante, §§ 33-35.

⁴³ *Connor v. Third Nat. Bank*, 90 Mich. 329, 51 N. W. 523; *Bloodgood v. Meissner*, 84 Wis. 452, 455, 54 N. W. 772; *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221. But see *Gibson v. National Park Bank*, 98 N. Y. 87, 97; *Folsom v. Haskell*, 11 Cush. 470.

⁴⁴ *Despatch Line v. Bellamy Manuf'g Co.*, 12 N. H. 205; *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223.

The garnishee cannot urge the defense that he is a trespasser when the defendant has acquiesced. *Lovejoy v. Lee*, 35 Vt. 430.

valuables taken from persons held to answer criminal charges.⁴⁵ When it appears that the defendant was not arrested under color of a criminal prosecution by an officer in collusion with the plaintiff, and for the purpose of getting possession of the property of the debtor by an abuse and perversion of legal process, but that he was arrested for the sole purpose of bringing him to punishment for his crime, there can be no objection to charging such officer as his garnishee for any valuables which such officer, in the discharge of his duty, has rightfully taken from the person of his prisoner; and, by the weight of authority, he may be held by such garnishment.⁴⁶ But an officer can never

⁴⁵ *Robinson v. Howard*, 7 Cush. 257; *Morris v. Penniman*, 14 Gray, 220, 74 Am. Dec. 675; *Richardson v. Anderson* (Tex. App.) 18 S. W. 195; *Connolly v. Thurber Whyland Co.*, 92 Ga. 651, 18 S. E. 1004.

⁴⁶ *Patterson v. Pratt*, 19 Iowa, 358; *Reifsnyder v. Lee*, 44 Iowa, 101, 24 Am. Rep. 733; *Closson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459.

PROPERTY NOT CONNECTED WITH OFFENSE CHARGED: "We think it cannot be said that the search was unlawful; but when it was ascertained that the money and property were in no way connected with the offense charged, and was not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process, as an aid to civil actions for the collection of debts." *Commercial Exch. Bank v. McLeod*, 65 Iowa, 665, 19 N. W. 329.

Held, that an officer may lawfully take from a prisoner any valuable thing which the prisoner might use in effecting his escape, and, therefore, that the same may be garnished in the hands of the officer. *Closson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459.

COLORABLE PROSECUTION: "After a careful examination of the constitution, prohibiting unreasonable searches and seizures, the common law, the statutes, and authorities, we hold that it is the duty of an officer, having no other authority than the right to make the

be charged as garnishee for property taken from a prisoner when it appears that the criminal charge was a mere pretext to acquire it, or was made as the instrument of a private action; for no lawful thing can be founded on a wrongful act, and it would be a shame

arrest, to search the party arrested, and seize and remove from him any dangerous weapon found on his person; and he may also seize any money or anything connected with the offense or which may be used as evidence against him on the prosecution, and retain the money or things until turned over to the state's attorney or paid into court, to abide the result of the trial; that an officer, acting in good faith, in the execution of his duty, and proceeding upon probable grounds for believing that the money or thing is connected with the offense charged, or may be used as evidence on the trial, may search and take from the defendant, arrested by him on a criminal charge, money found on his person, and he will not be liable in damages for a trespass, although it may turn out that the money or thing was not in fact connected with the offense, or could not be used as evidence of the commission of the offense; that the money or thing seized by the officer, under the foregoing limitations, during the time it is in his hands, or if paid into court, is not in the possession of the defendant, but is thereby sequestered, and subject to attachment or garnishment, under section 2950 of the Code; that if the arrest was not made in good faith, or if the money or thing is seized without probable grounds for believing that it is connected with the offense, or useful as evidence on the trial, the levy made, under such circumstances, is invalid; or, if procured by trickery or fraud on the part of the attaching creditor, the levy will be held invalid; and the officer making the levy, if he knows of the fraud, and person procuring it to be done by such means and for such purposes, will be liable to a suit for damages. We believe these principles consistent with the personal liberty of the person arrested, as secured to him by the constitution of the state, and concede to the officer all the authority given to him by the common or statute law. We know of no law which will prevent a creditor from having the property of his debtor levied upon to satisfy his debt, when it can be done without committing a trespass, or by fraud or violence." *Ex parte Hurn*, 92 Ala. 102, 9 South. 515. This case contains a careful review of a large number of decisions.

to the law if its perverters were allowed to reap the benefits of their evil conduct.⁴⁷

What Constitutes a Debt.

Promise to Pay Debt of Another—Agency.

§ 57. The question whether the garnishee is indebted to the defendant is determined in garnishment proceedings by the same rules as if the defendant were suing the garnishee.⁴⁸ Any person incurring obligations in dealings with an agent may be charged as garnishee therefor in suits against the principal, whether he knew of the agency or not,⁴⁹ and cannot be charged in suits against the agent;⁵⁰ nor can the agent be charged on account of any obligation assumed in behalf of his known principal, for he does not render himself personally liable,⁵¹ but the principal may be.⁵²

⁴⁷ *Cunningham v. Baker* (Ala.) 16 South. 68, 71; *Ex parte Hurn*, 92 Ala. 102, 9 South. 515; *Pomroy v. Parmlee*, 9 Iowa, 140; *Ilisley v. Nichols*, 12 Pick. 270.

⁴⁸ *Ante*, § 46, and *post*, § 61.

⁴⁹ *Raynes v. Lowell Irish Ben. Soc.*, 4 Cush. 343.

⁵⁰ *Bank of Northern Liberties v. Jones*, 42 Pa. St. 536, 44 Pa. St. 253; *Farmers' & Mechanics' Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Morrill v. Raymond*, 28 Kan. 415; *Titecomb v. Seaver*, 4 Me. 542; *Granite Nat. Bank v. Neal*, 71 Me. 125; *Thomas v. Parsons*, 87 Me. 203, 32 Atl. 876; *Chapin v. Connecticut River R. Co.*, 16 Gray, 69; *Rutherford v. Fullerton*, 89 Ga. 353, 15 S. E. 471; *McArthur v. Garman*, 71 Iowa, 34, 32 N. W. 14; *Des Moines Cotton-Mill Co. v. Cooper* (Iowa) 61 N. W. 1084.

⁵¹ *Lewis v. Smith*, 2 Cranch, C. C. 571, Fed. Cas. No. 8,332; *Hewitt v. Wheeler*, 22 Conn. 557; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. Ry. Co.*, 33 W. Va. 761, 11 S. E. 58, 66; *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. 65.

⁵² *Buchanan Co. Bank v. Cedar Rapids, I. F. & N. W. Ry. Co.*, 62 Iowa, 494, 17 N. W. 737.

When money is collected for the defendant by his agent, it becomes his immediately; such agent may be charged as his garnishee; and the original debtor is no longer liable.⁵³ But one person cannot be substituted for another as the debtor of a third without the consent of the creditor, and therefore when the debtor puts money into the hands of any other person, with directions to pay the debt with it, such person is his own agent, the debt remains, the money continues his, such person has no money belonging to the creditor to whom he agreed to pay it, and is not indebted to him until the creditor assents to the arrangement, and agrees to look to such person for payment. This same is true of agreements to assume the debt of another. For these reasons the creditor's rights can be garnished up to that time only by proceedings against the original debtor;⁵⁴ and the money is till then liable to

⁵³ Kennedy v. Aldridge, 5 B. Mon. (Ky.) 141; Barnard v. Graves, 16 Pick. 41.

LODGE DUES: When treasurers of local lodges of fraternal societies receive payment of dues from the members of such lodges for the purpose of forwarding the same to the head lodge, they may be charged therefor as garnishees of the head lodge. Jepson v. International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15.

⁵⁴ Howard Harrison Iron Co. v. Tillman (Ala.) 15 South. 456; Pollock v. Jones, 96 Ala. 492, 11 South. 529; Huntley v. Stone, 4 Wis. 91; Merrell v. Campbell, 49 Wis. 535, 5 N. W. 912; Kirby v. Corning, 54 Wis. 599, 12 N. W. 69; Searing v. Benton, 41 Kan. 758, 21 Pac. 800; Felch v. Eau Plaine Lumber Co., 58 Wis. 431, 17 N. W. 397; Burnham v. Beal, 14 Allen, 217; Casey v. Davis, 100 Mass. 124; Hartman v. Olvera, 54 Cal. 61; Wright v. Foord, 5 N. H. 178; Triebel v. Colburn, 64 Ill. 376; Neuer v. O'Fallon, 18 Mo. 277; Briggs v. Block, 18 Mo. 281.

An agent who has collected rent for a trustee is not liable to garnishment for a debt against the beneficiary. McIlvaine v. Lancaster, 42 Mo. 96.

A., being indebted to B., procured the promise of C., for a valuable

garnishment in suit against the person from whom it was received.⁵⁵ Afterwards it could be garnished only in suits against the person to whom it was sent.⁵⁶ These decisions are based upon the fundamental principles of law that none but the parties to a contract can be bound by it.

Privity of Contract.

§ 58. Akin to this is another rule,—that no man can acquire rights under a contract to which he is not a party.⁵⁷ This last rule has practically ceased to exist in most of the states, but it has been held upon this ground that money due upon a policy of insurance upon the life of a married woman, entered into between her and the insurance company, for the benefit of her husband, cannot be reached by garnishment in a suit against him;⁵⁸ that a mortgagee to whom policies of insurance were assigned by the mortgagor as

consideration, to pay this debt, and afterwards B. sued A. for the debt, and, on recovering judgment, summoned C. as garnishee. Held, that C. should be charged on the above agreement. *Martin v. Copeland*, 77 Ga. 374, 3 S. E. 256; *Chapman v. Mears*, 56 Vt. 389; *Yates v. Hurst*, 41 Vt. 556.

⁵⁵ *Burger v. Burger*, 135 Pa. St. 499, 19 Atl. 1073; *Nicholas v. Crook*, 56 Md. 55; *Cox v. Reeves*, 78 Ga. 543, 3 S. E. 620; *Kelly v. Roberts*, 40 N. Y. 432; *Witter v. Little*, 66 Iowa, 431, 23 N. W. 909.

⁵⁶ *Brooks v. Hildreth*, 22 Ala. 469; *Smith v. Clarke*, 9 Iowa, 241.

COLLECTION TO APPLY ON ACCOUNT: When a debtor gives his creditor an account to collect, and apply the proceeds on the debt, the money so collected and in the hands of the creditor's attorney belongs to the creditor, and cannot be garnished in a suit against the debtor. *Hale v. Foley*, 47 Vt. 260.

⁵⁷ *Anson*, Cont. pt. 3, c. 1..

⁵⁸ *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100.

CHANCERY GARNISHMENT: Held, that the fact that garnishment cannot be sustained is no reason for granting relief under a bill in equity. *Venable v. Rickenberg*, 152 Mass. 64, 24 N. E. 1083.

security, with a stipulation that any balance after paying the mortgage debt should be paid to a creditor of the mortgagor, cannot be charged as garnishee of such creditor by reason of such surplus in his hands;⁵⁹ that one who has bound himself by bond to pay an annuity to a person not party to the bond cannot be charged as garnishee of the annuitant by reason of the annuity being in arrear;⁶⁰ and that a debtor cannot be charged as garnishee of the assignee of his debt.⁶¹ These decisions all go upon the assumption that, in order to charge the garnishee as debtor, there must exist a privity of contract between him and the defendant in respect to the liability sought to be attached, and there are numerous other authorities declaring the same doctrine, especially in the New England states.⁶² These decisions are ignored by the courts of most of the states, or considered inapplicable to their statutes; and it may be laid down as a general principle that, regardless of any privity of contract, the garnishee may be charged as debtor for any money obligation he may owe the defendant.⁶³

Legacies, etc.

§ 59. When property is devised subject to a trust, and the devisee accepts the same, he becomes the debt-

⁵⁹ Field v. Crawford, 6 Gray, 116.

⁶⁰ Brigden v. Gill, 16 Mass. 522.

⁶¹ Folsom v. Haskell, 11 Cush. 470.

⁶² Barker v. Esty, 19 Vt. 131; Field v. Crawford, 6 Gray, 116; Chase v. Thompson, 153 Mass. 14, 26 N. E. 137; Morey v. Sheltus, 47 Vt. 342.

See, also, Drake, *Attachm.* §§ 487-491a, 546, where the decisions on this subject are collected and reviewed.

⁶³ Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518; De Graff v. Thompson, 24 Minn. 452.

or of the cestui que trust, and may be charged as his garnishee therefor,⁶⁴ unless discretionary powers are conferred upon the trustee as to the manner of payment or appropriation,⁶⁵ or to allow the garnishment would be applying the funds contrary to the express directions of the testator;⁶⁶ and the debtor of the decedent may be charged as garnishee of the heir.⁶⁷

⁶⁴ *Woodward v. Woodward*, 9 N. J. Law, 115, 17 Am. Dec. 462; *Park v. Mathews*, 36 Pa. St. 28, 2 Grant (Pa.) 136; *Easterly v. Keney*, 36 Conn. 18; *Lawrence v. Security Co.*, 56 Conn. 423, 15 Atl. 406; *Red v. Powers*, 69 Miss. 242, 13 South. 586; *Davis v. Davis*, 30 Vt. 440; *Hinckley v. Williams*, 1 Cush. 490; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Knefler v. Shreve*, 78 Ky. 297; *Van Amee v. Jackson*, 35 Vt. 173.

UNEARNED ANNUITY: As to payments not yet due the annuitant, execution against the garnishee should be stayed till they mature. *Red v. Powers*, above. "In relation to the rents and profits that may hereafter come into the hands of the trustee, we know of no law or practice that will enable the petitioner, by the aid of a petition, to seize them before they accrue or come into the hands of the trustee. The mere fact that it is morally certain that the trustee will at times have the funds of the cestui que trust in his hands can make no difference." *Easterly v. Keney*, *supra*.

CONDITIONS PRECEDENT: An administrator is chargeable as garnishee of an heir for his share of the estate, although nothing has yet passed into his hands. *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 27 N. E. 915.

A person to whom land is conveyed upon condition that he pay \$1,000 to a third party cannot be charged as garnishee of such third party therefor, in the absence of any promise on his part to pay such amount. *Morey v. Sheltus*, 47 Vt. 342.

When the amount due one of several cestuis que trustent has been determined, and nothing remains for the trustee to do but to pay it, he may be charged as garnishee therefor. *Haskell v. Haskell*, 8 Metc. (Mass.) 545, cited with approval in *Estabrook v. Earle*, 97 Mass. 302.

⁶⁵ *White v. Jenkins*, 16 Mass. 62; *Brigden v. Gill*, *Id.* 522; *Hinckley v. Williams*, 1 Cush. 490.

⁶⁶ *Nichols v. Eaton*, 91 U. S. 716; *Pope's Ex'r v. Elliott*, 8 B. Mon.

⁶⁷ *Simmons v. Carmichael* (Tex. Civ. App.) 28 S. W. 690.

Garnishee's Contracts.

Requiring Payment at Particular Place.

§ 60. The liability of the garnishee will not be affected by the fact that he has agreed with the defendant to pay the money or deliver the property for which he is sought to be charged to the defendant himself, or any other person, at some particular time, or in some state or county other than the one in which he is sought to be charged.⁶⁸ If this were a defense, it

(Ky.) 56; Meek v. Briggs, 87 Iowa, 610, 54 N. W. 456; Fisher v. Taylor, 2 Rawle (Pa.) 33; White v. White, 30 Vt. 338; Brooks v. Reynolds, 59 Fed. 923, 8 C. C. A. 371; Reynolds v. Hanna, 55 Fed. 783.

LEGACIES MAY BE PLACED BEYOND REACH OF CREDITORS: "A benefactor may certainly provide for the maintenance of a friend without exposing his bounty to the debts or imprudence of the beneficiary." Holdship v. Patterson, 7 Watts (Pa.) 547; Kinsloe v. Davis, 167 Pa. St. 519, 31 Atl. 934; Prentice v. Pleasonton (Pa. Sup.) 8 Atl. 842.

"But the doctrine that the owner of the property, in the exercise of his free will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due to his creditors, though that may deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court." Nichols v. Eaton, 91 U. S. 725. To the same effect, Steib v. Whitehead, 111 Ill. 247; Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11,133.

CONTRA, WRITTEN ORDERS BEFORE PAYMENT: "It is true that in the case under consideration the trustee may require the written order of the cestui que trust before he can be compelled to pay the income, but this can make no difference with the ownership of the income. * * * The clause in the devise that the rents and profits shall in no case inure to the benefit of the creditors of Goodwin can have no effect. If the income was his, it was his for all purposes, like any other property." Easterly v. Keney, 36 Conn. 18.

⁶⁸ Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168, 174, 37 N.

would necessarily defeat every garnishment suit, for the inevitable result and the primary purpose of the proceeding is to compel the garnishee to pay the money or deliver the property otherwise than in his contract with the defendant he had agreed to do, so far as he has any contract with him, and to pay and deliver it to a different person than he had agreed with defendant.

W. 70; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905; *Leiber v. Union Pac. R. Co.*, 49 Iowa, 688; *Mooney v. Union Pac. R. Co.*, 60 Iowa, 346, 14 N. W. 343; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134; *Blake v. Williams*, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; *Sturtevant v. Robinson*, 18 Pick. 175; *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172; *East Tennessee, V. & G. Ry. Co. v. Kennedy*, 83 Ala. 462, 3 South. 853; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Pomeroy v. Rand, McNally & Co.* (Ill. Sup.) 41 N. E. 636; *Cross v. Brown* (R. I.) 33 Atl. 147; *Losee v. McCarty*, 5 Utah, 528, 17 Pac. 452; dissenting opinion in *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 387, 23 Pac. 435.

RIGHT TO DELIVER AT PARTICULAR PLACE: The garnishee cannot be compelled to deliver or pay at a place other than he has agreed with the defendant to do when such alteration of the place of delivery would be to his disadvantage. *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172. But, when he will not be prejudiced, he may be. *Adams v. Scott*, 104 Mass. 164.

The garnishee bought a building of the defendant, agreeing to pay for the same in writing paper, at market price, delivered in New York. The court held the garnishee not liable, saying: "The court are of opinion that a person who has made a contract to deliver goods at a place out of the state cannot be charged as trustee of him to whom he has contracted to deliver them. Sections 22 and 24 of our trustee law seem to us decisive of this point. * * * They require that the person who is charged as trustee shall deliver the goods to an officer of the state, but they require him to do it only at the place specified in the contract of delivery. If that place be without the state, the officer has no authority as an officer to go there or to receive the goods there." *Clark v. Brewer*, 6 Gray, 320.

Allowing garnishment of goods to be delivered out of the state is not an attempt to regulate interstate commerce. *Landa v. Missouri, K. & T. Ry. Co.* (Mo. Sup.) 31 S. W. 200.

But the garnishee cannot be charged if payment of the garnishment judgment would not discharge his obligation to the defendant, or entitle him to fulfillment by the defendant of his part of the contract. Thus where the garnishee had agreed with the defendant to pay at New Mexico, by New York or Chicago draft, a certain amount upon the defendants delivering certain cattle at the same time and place, it was held that the garnishee could not be charged.⁶⁹

Garnishee's Contract Rights not Impaired.

§ 61. Nor can the garnishee be charged in any case in such a manner as to deprive him of any bona fide contract rights which he holds as against the defendant.⁷⁰ Thus, he cannot be compelled to perform his contract in a manner more disadvantageous to himself than he had agreed with the defendant, as to pay in money instead of goods.⁷¹ He cannot be charged as garnishee of the defendant on a contract under which he has the option to discharge his obligation by payment to the defendant or another, at least when he

⁶⁹ *Hamilton v. Rogers*, 67 Mich. 137, 34 N. W. 278. See, also, ante, § 48.

⁷⁰ *Daggett v. McClintock*, 56 Mich. 51, 22 N. W. 105; *Rice v. Third Nat. Bank*, 97 Mich. 414, 56 N. W. 776; *Dawson v. Iron Range & H. B. Ry. Co.*, 97 Mich. 33, 56 N. W. 106; *Balliet v. Scott*, 32 Wis. 174; *Drake v. Harrison*, 69 Wis. 99, 33 N. W. 81; *Rock Island Lumber & Manuf'g Co. v. Equitable Trust & Inv. Co.*, 54 Kan. 124, 37 Pac. 984; *Cahill v. Bennett*, 26 Wis. 577; *Kansas Inv. Co. v. Jones* (Kan. App.) 42 Pac. 935; *Williams v. Housel*, 2 Iowa, 157; *Dryden v. Adams*, 29 Iowa, 195; *Truitt v. Griffin*, 61 Ill. 26; *Baltimore & O. Ry. Co. v. Wheeler*, 18 Md. 372; *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254; *Mensing v. Engelke*, 67 Tex. 533, 4 S. W. 202; *Ghio v. Western Assur. Co.*, 65 Miss. 532, 5 South. 102; *Mobile St. Ry. Co. v. Turner*, 91 Ala. 213, 8 South. 684.

⁷¹ See post, § 116.

has an interest in paying to the other;⁷² and, though his interest in that will be presumed, he may give positive evidence of it.⁷³

Insurance—Election to Rebuild.

§ 62. He cannot be held to pay money on proof of liability on an insurance policy, loss having occurred, where the policy contained a provision that the underwriter might rebuild, or pay the amount of the loss in money.⁷⁴ But it has been hinted that in such cases the court, on motion, should hold the case over till the expiration of a limited option, and compel the company to elect which liability it would assume, and charge or discharge it in the end, as its election might require.⁷⁵

Debts Payable on Completion of Contract.

§ 63. When the garnishee has employed the defendant on a contract whereby nothing is to become

⁷² Fitzgerald v. Hollingsworth, 14 Neb. 188, 15 N. W. 345; Doyle v. Gray, 110 Mass. 206; Schafer v. Vizona, 30 Minn. 387, 15 N. W. 675; Vollmer v. Chicago & N. W. Ry. Co., 86 Wis. 306, 56 N. W. 919; Kiely v. Bertrand, 67 Mich. 332, 34 N. W. 674; Taylor v. Burlington & M. R. Ry. Co., 5 Iowa, 115; Garland v. Sperling (N. M.) 30 Pac. 925; Joslyn v. Merrow, 25 Vt. 185.

⁷³ Drake v. Harrison, 69 Wis. 99, 33 N. W. 81.

⁷⁴ Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201; Stone v. Mutual Fire Ins. Co., 74 Md. 579, 22 Atl. 1051; Dowling v. Lancashire Ins. Co., 89 Wis. 96, 60 N. W. 76; Hurst v. Home Protection Fire Ins. Co., 81 Ala. 175, 1 South. 209. See, also, Jones v. Crews, 64 Ala. 368; Carter v. Webster & W. Paper Co., 65 N. H. 17, 17 Atl. 978.

As to proof of loss, see post, § 119. As to adjustment of loss, see post, § 149.

⁷⁵ Hurst v. Home Protection Fire Ins. Co., 81 Ala. 175, 1 South. 209.

Held that, when such an option existed at the time the summons was served, the garnishee must be discharged, and it was immaterial

due till the contract is completed, the garnishee cannot be held unless at the time the summons is served on him the defendant had completed his contract.⁷⁶ He cannot be charged as upon a quantum meruit for the part already performed if the defendant could not abandon his contract and recover for it. In other words, if the defendant's right to claim anything depends upon his completing the contract, the garnishee cannot be bound to pay anything unless the defendant had completed his contract at the time the summons was served on the garnishee.⁷⁷

When Liable for Part Performance.

§ 64. If the liability of the garnishee to the defendant for the part of the contract already performed does not depend upon the completion of the contract by the defendant, there is no reason why the garnishee should not be charged for the amount already per-

that the company afterwards elected to pay cash. *Godfrey v. Macomber*, 128 Mass. 188.

⁷⁶ *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390; *Wheeler v. Day*, 23 Minn. 545; *Potter v. Cain*, 117 Mass. 238; *Peterson v. Loring*, 135 Mass. 397; *Foster v. Singer*, 69 Wis. 392, 34 N. W. 395; *Edwards v. Roepke*, 74 Wis. 571, 43 N. W. 554; *Warner v. Perkins*, 8 Cush. 518; *Hennessey v. Farrell*, 4 Cush. 267; *Robinson v. Hall*, 3 Metc. (Mass.) 301; *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. 65; *Coburn v. City of Hartford*, 38 Conn. 290; *Curtis v. Alvord*, 45 Conn. 569; *Kettle v. Harvey*, 21 Vt. 301; *Carter v. Webster & W. Paper Co.*, 65 N. H. 17, 17 Atl. 978; *Garland v. Sperling* (N. M.) 30 Pac. 925, 31 Pac. 499; *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Early v. Redwood City*, 57 Cal. 193. Compare *White v. Hobart*, 90 Ala. 368, 7 South. 807.

An entire contract before completion is not a case of *debitum in præsentì solvendum in futuro*. *Potter v. Cain*, 117 Mass. 238.

⁷⁷ *Foster v. Singer*, 69 Wis. 392, 34 N. W. 395; *McDonald v. Bryant*, 73 Wis. 20, 40 N. W. 665. See, also, cases cited above, and ante, § 46.

formed;⁷⁸ especially under statutes providing that the garnishee shall be liable for any indebtedness due or to become due.⁷⁹ And, where the garnishee is to pay in installments upon estimates for work as the job progresses, he can only be held for the amount due on estimates,⁸⁰ less the amount which, by his contract, he is to retain as indemnity till the job is completed.⁸¹

Contracts Made after Garnishment.

§ 65. Of course, neither the garnishee nor the defendant can, after the garnishment, make any new contract or ratify any previous acts, so as to cut off the plaintiff's lien;⁸² and the garnishee can no more than any other party claim any right under a contract to which he is a stranger.⁸³ But it is not the purpose of the garnishment statutes to cut off the contract rights of any person other than the defendant. To these, and these only, the plaintiff is subrogated.⁸⁴

Assignments of the Garnished Property or Debt.

Garnishment Defeated by Prior Transfer.

§ 66. If the garnishee's indebtedness or the property in his possession had been transferred by the de-

⁷⁸ *Joslyn v. Merrow*, 25 Vt. 185; *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390.

⁷⁹ *Wheeler v. Day*, 23 Minn. 545. See, also, post, § 126.

⁸⁰ *Webber v. Bolte*, 51 Mich. 113, 16 N. W. 257.

⁸¹ *American Forcible Powder Manuf'g Co. v. Malone*, 166 Pa. St. 289, 31 Atl. 90.

⁸² *Sturtevant v. Robinson*, 18 Pick. 175; *Gerry v. Remick* (Me.) 5 Atl. 268; *Edgerton v. Martin*, 35 Vt. 116; *Ellis v. Goodnow*, 40 Vt. 237. See, also, ante, § 45, and post, § 176.

⁸³ *Webster v. Randall*, 19 Pick. 13.

⁸⁴ *Owen v. Estes*, 5 Mass. 330; *Armor v. Cockburn*, 4 Mart. (N. S.; La.) 667; *Dressor v. McCord*, 96 Ill. 389.

fendant by any valid assignment, completed before the garnishment summons was served, the garnishee cannot be charged on account of such property; and it makes no difference that he did not know of the sale till after the summons was served on him.⁸⁵ The rights of equitable assignees and claimants will al-

⁸⁵ McDonald v. Kneeland, 5 Minn. 352 (Gil. 284); Williams v. Minneapolis & St. P. Ry. Co., 27 Minn. 85, 6 N. W. 445; Banning v. Sibley, 3 Minn. 389 (Gil. 282); Lewis v. Traders' Bank, 30 Minn. 244, 15 N. W. 113; McMahon v. Merrick, 33 Minn. 262, 22 N. W. 543; Mowry v. Crocker, 6 Wis. 326; Beck v. Cole, 16 Wis. 100; Wakefield v. Martin, 3 Mass. 558; Dix v. Cobb, 4 Mass. 508; Warren v. Copelin, 4 Metc. (Mass.) 594, 598; Thomas v. Sprague, 12 Mich. 120; Smith v. Holland, 81 Mich. 472, 45 N. W. 1017; Coleman v. Scott, 27 Neb. 77, 42 N. W. 896; McGuire v. Pitt's Sons, 42 Iowa, 535; Abbott v. Davidson (R. I.) 25 Atl. 839; Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922; Walling v. Miller, 15 Cal. 39; Handley v. Pfister, 39 Cal. 283; Greentree v. Rosenstock, 61 N. Y. 582; Hudson v. McConnel, 12 Ill. 170; Cairo & St. L. Ry. Co. v. Killenberg, 82 Ill. 295; Ives v. Addison, 39 Kan. 172, 17 Pac. 797; Jones v. Lowery Banking Co. (Ala.) 16 South. 11; Schoolfield v. Hirsh, 71 Miss. 55, 14 South. 528.

This principle was applied under a statute making the garnisher a purchaser for value. Meier v. Hess, 23 Or. 599, 32 Pac. 755.

NOTICE NECESSARY: There are a few cases holding that notice to the debtor is necessary to complete the assignment; and therefore, if he is summoned as garnishee of the original owner before receiving notice of the assignment, the garnishment will prevail. Ward v. Morrison, 25 Vt. 593; Nichols v. Hooper, 61 Vt. 295, 17 Atl. 134; Bishop v. Holcomb, 10 Conn. 444; Van Buskirk v. Hartford Ins. Co., 14 Conn. 140, 36 Am. Dec. 473; Rodes v. Haynes (Tenn.) 33 S. W. 564; Clodfelter v. Cox, 33 Tenn. 330, 60 Am. Dec. 157; Miller v. O'Bannon, 4 Lee (Tenn.) 398, 403; Robinson v. Baker, 10 Lea (Tenn.) 300.

NOTICE WHEN NOT NECESSARY: Held, that when the title of the assignor is evidenced by writing, and by the transfer he is denuded of the indicia of title, the assignment is good without notice. Gayoso Sav. Inst. v. Fellows, 6 Cold. (Tenn.) 467.

STATE REGULATES LAW OF TRANSFER: "The power of a state to regulate the transfer of all property within its territory is

ways be protected, and will thus far defeat the garnishment.⁸⁶ If the assignee or beneficiary under the

well established. *Story, Conf. Laws*, par. 390; *Green v. Van Buskirk*, 7 Wall. 151. When this power is asserted by legislation of the state where the property is situated, any principle of comity in conflict therewith must not render the legislation invalid." *Steel v. Goodwin*, 113 Pa. St. 288, 6 Atl. 49. The law of the place where the garnishment suit was tried governs in determining the subsequent liability of the garnishee to the assignee. *Warren v. Copelin*, 4 Metc. (Mass.) 594.

An assignment valid where made is valid everywhere. *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460. Compare *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395; *Martin v. Porter*, 34 Vt. 87.

GENERAL ASSIGNMENT DISSOLVING GARNISHMENT: In some states an assignment for benefit of creditors made within a certain time after an attachment or garnishment dissolves such levy. This means an assignment complete within the time. *Palmer v. Woodward*, 28 Conn. 248.

FOREIGN INSOLVENCY PROCEEDINGS are held not to prevent charging debtors of the insolvent in garnishments subsequently instituted. *Cross v. Brown* (R. I.) 33 Atl. 147, 153.

When a creditor residing in a state where the insolvency proceedings are instituted, and where his debtor resides, afterwards brings a suit in another state, and garnishes debts or property there situated, belonging to the insolvent, and thus seeks to gain advantage over other creditors, the courts of such state will give effect to the insolvency proceedings, and dismiss the garnishment. The prior insolvency proceedings will be disregarded only to protect from injury creditors residing where the attachment is laid. *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395; *Long v. Girdwood*, 150 Pa. St. 413, 24 Atl. 711.

IN ILLINOIS, garnishing creditors share pro rata; and an assignment after the first garnishment, but before the rest, is postponed to all garnishments. *Reeve v. Smith*, 113 Ill. 47; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401.

When an assignment is shown, the court has no right to disregard

⁸⁶ *Carr v. Waugh*, 28 Ill. 418; *Dressor v. McCord*, 96 Ill. 389; *Smith v. Clarke*, 9 Iowa, 241; *Haas v. Old Nat. Bank*, 91 Ga. 307, 18 S. E. 188; *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107.

assignment waive all claims under it, and consent that judgment be rendered in favor of the plaintiff in garnishment, of course the objection does not lie in the mouth of the garnishee.⁸⁷

Garnishee's Notice of Assignment.

§ 67. If the garnishee receive notice of the assignment at any time before he is charged, and so that he has opportunity to communicate the fact to the court, he should not be charged.⁸⁸ But, on the other hand, if the garnishee had no knowledge of the fact, payment of the garnishment judgment will afford him full protection *pro tanto*.⁸⁹ Mere rumor of an assignment coming to the ear of the garnishee is not sufficient to charge him with notice.⁹⁰ But, if he received notice from the assignee or his agent, it matters not how.⁹¹

it, assuming it to be invalid; the plaintiffs must impeach it. *Hecht v. Green*, 61 Cal. 269; *Wilhelmi v. Haffner*, 52 Ill. 222.

WHAT FACTS SHOW AN ASSIGNMENT: See *First Nat. Bank v. Van Brocklin*, 72 Iowa, 761, 33 N. W. 151; *Clark v. Wiss*, 34 Kan. 553, 9 Pac. 281; *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107.

⁸⁷ *Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa, 4, 55 N. W. 67.

⁸⁸ *Noble v. Smith*, 6 R. I. 446; *Tracy v. McGarty*, 12 R. I. 168; *Northam v. Cartwright*, 10 R. I. 19; *Lee v. Robinson*, 15 R. I. 369, 5 Atl. 290; *Crayton v. Clark*, 11 Ala. 787. See, also, post, §§ 206, 207.

⁸⁹ See post, § 205.

⁹⁰ *Beck v. Cole*, 16 Wis. 95.

WHAT CONSTITUTES NOTICE: Held, that this notice must emanate from the assignee, and be given by his procurement, but need not be given by him personally or by his agent employed directly for that purpose. *Barron v. Porter*, 44 Vt. 587; *Peck v. Walton*, 25 Vt. 33; *Webster v. Moranville*, 30 Vt. 701; *Brickett v. Nichols*, Id. 743; *Farmers' & Mechanics' Bank v. Drury*, 35 Vt. 469.

Notice to a local agent of an insurance company held not notice to

⁹¹ See following page.

Assignment without Notice to Assignee.

§ 68. When an assignment is made, and, before the assignee has knowledge of the assignment, creditors of the assignor attach the property by levy or garnishment, courts do not agree as to which shall prevail,—the assignee or the attaching creditor. On the one hand, it is urged that the assignee's assent to that

the company, and notice to general agent held good notice. *Weed Sewing-Machine Co. v. Boutelle*, 56 Vt. 570.

Notice by claimant to garnishee's wife, and by her communicated to him, is sufficient. *Holt v. Babcock*, 63 Vt. 634, 22 Atl. 459.

When a demand is due from two or more jointly, notice to one is sufficient. *Foster v. Mix*, 20 Conn. 395; *Ayott v. Smith*, 40 Vt. 532, 94 Am. Dec. 429; *Thayer v. Lyman*, 35 Vt. 646.

The garnishee, having received a letter purporting to be signed by one P., and stating that he had bought the note involved in the garnishment suit, describing it, and asking payment, testified that he did not know the handwriting of P. Held, that the letter was not notice of the assignment. *McAllister v. Brooks*, 22 Me. 80, 38 Am. Dec. 282.

Suing and declaring on the assigned demand is sufficient notice of the assignment. *Austin v. Ryan*, 51 Vt. 110.

Notice to the overseer of the poor is not good to show an assignment of money due from the town for keeping a pauper. *Thompson v. Downing*, 48 Vt. 646. Notice on Sunday is sufficient. *Crozier v. Shants*, 43 Vt. 478.

It must be actual, and not constructive, notice. *Stearns v. Wrisley*, 30 Vt. 661.

⁹¹ *Bank of St. Mary v. Morton*, 12 Rob. (La.) 409; *Barron v. Porter*, 44 Vt. 587.

FORM, PURPOSE, AND EVIDENCE OF NOTICE: The notice may be merely casual, and for no definite purpose, and yet be sufficient. *Dale v. Kimpton*, 46 Vt. 76.

"No particular form of words is necessary for such notice, but the idea—the fact—that he had such an assignment must be fairly and substantially made known." *Cahoon v. Morgan*, 38 Vt. 234; *Dale v. Kimpton*, *supra*.

To determine this question, the whole transaction and various interviews may be considered. *Dale v. Kimpton*, *supra*.

which can only be beneficial to him may be presumed till the contrary is shown;⁹² and, if the assignment be to trustees for the benefit of the real parties in interest, the legal estate immediately passes and vests in the trustees.⁹³ and the subsequent assent will relate back to the time of executing the instrument.⁹⁴ On the other hand, it is said that no such presumption of acceptance can be indulged against an attaching or garnishing creditor, and that the garnishee is liable if summoned before the beneficiaries under the assignment assent to it.⁹⁵

Splitting up Demands.

§ 69. It is a general rule of law that claims cannot be split up so as to subject a party to distinct suits against his will, and that, although the demand may be assigned, yet he may insist upon his right to discharge it by one payment to one person, and that as-

⁹² *Randolph Bank v. Armstrong*, 11 Iowa, 515; *Van Winkle v. Iowa, I. & S. F. Co.*, 56 Iowa, 245, 9 N. W. 211; *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5,964.

⁹³ *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522, 529; *Houston v. Nowland*, 7 Gill & J. (Md.) 480; *Schoolfield v. Hirsh*, 71 Miss. 55, 14 South. 528.

⁹⁴ *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5,964; *Smith v. Millett*, 11 R. I. 528. Compare *Cooper v. McClun*, 16 Ill. 435.

⁹⁵ *Ward v. Lampson*, 6 Pick. 358; *Brewer v. Pitkin*, 11 Pick. 298; *Fall River I. W. Co. v. Croade*, 15 Pick. 11; *Edwards v. Mitchell*, 1 Gray, 239; *Swan v. Crafts*, 124 Mass. 453; *Pierce v. O'Brien*, 129 Mass. 314; *Alliance Milling Co. v. Eaton*, 86 Tex. 401, 25 S. W. 614; *Willis v. Murphy* (Tex. Civ. App.) 28 S. W. 362; *Scheuber v. Simmons*, 2 Tex. Civ. App. 672, 22 S. W. 72; *Greene & Button Co. v. Remington*, 72 Wis. 648, 656, 39 N. W. 767; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. 379; *Sabin v. Michell* (Or.) 39 Pac. 635.

Alliance Milling Co. v. Eaton, *supra*, contains an exhaustive and able review of the decisions on this question.

signments of part of a demand cannot be sustained unless assented to by the party owing it.⁹⁶ But authorities are not wanting to the effect that an assignment of a part of a demand without the assent of the person bound to pay it is good against one subsequently summoning him as garnishee in a suit against the assignor.⁹⁷ Of course, it is no defense to the garnishment that it would split up the demand, for the statute contemplates such results.⁹⁸

Orders, Checks, and Drafts as Assignments of the Fund Drawn on.

An Equitable Assignment of Amount of Order.

§ 70. By the weight of authority, when an order, draft, or bill for a valuable consideration is drawn on the whole of a particular fund, it operates as an equitable assignment of such fund to the payee, who is therefore entitled to the same against one afterwards garnishing the drawee in a suit against the drawer before such order is presented for payment or accept-

⁹⁶ *Gibson v. Cooke*, 20 Pick. 15, 32 Am. Dec. 194; *Carter v. Nichols*, 58 Vt. 553, 5 Atl. 197.

⁹⁷ *Exchange Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388; *Horne v. Stevens*, 79 Me. 262, 9 Atl. 616; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *County of Des Moines v. Hinkley*, 62 Iowa, 637, 17 N. W. 915; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Daniels v. Meinhard*, 53 Ga. 359.

ASSIGNMENTS AS SECURITY: When an assignment of the legal title was not intended to pass the whole property, but merely to secure payment to the assignee of a certain debt, then the garnishee should at least be charged for the balance. *Beck v. Cole*, 16 Wis. 100; *Leighton v. Heagerty*, 21 Minn. 45; *Macomber v. Doane*, 84 Mass. 541.

⁹⁸ *Pomeroy v. Rand, McNally & Co.* (Ill. Sup.) 41 N. E. 636.

ance;⁹⁹ and, though such order be not in terms drawn against any particular fund, the fact that it is for the same amount as the fund in question, together with other circumstances, may tend to show an intent that it should operate as an assignment, which intent, when proved, controls.¹⁰⁰

Same—Commercial Bank Account.

§ 71. It has been held that when a depositor draws a check on his banker in the regular course of business, who has funds to an equal or greater amount, it op-

⁹⁹ Lee v. Robinson, 15 R. I. 369, 5 Atl. 290; Macomber v. Doane, 2 Allen, 541; Lewis v. Traders' Bank, 30 Minn. 134, 14 N. W. 587; Kingman v. Perkins, 105 Mass. 111; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; Robins v. Bacon, 3 Me. 346; Jenness v. Wharff, 87 Me. 307, 32 Atl. 908; State v. Hastings, 15 Wis. 75; First Nat. Bank v. Dubuque S. W. Ry. Co., 52 Iowa, 378, 3 N. W. 395.

ORDER MUST HAVE BEEN INTENDED AS ASSIGNMENT: "The claim was for the balance due on a horse trade. * * * The order, being a bill of exchange not accepted, created no liability, but for that very reason did not extinguish or change the character of the original liability, and was not inconsistent with a transfer or assignment of it. * * * If an assignment was really intended, the order was a proper auxiliary to aid in completing it." Tabor v. Van Vranken, 39 Mich. 793.

¹⁰⁰ Haas v. Old Nat. Bank, 91 Ga. 307, 18 S. E. 188; Fourth Nat. Bank v. Mayer, 89 Ga. 108, 14 S. E. 891; Jones v. Glover, 93 Ga. 484, 21 S. E. 50; Moore v. Davis, 57 Mich. 251, 23 N. W. 800; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Miller v. Hubbard, 4 Cranch, C. C. 451, Fed. Cas. No. 9,574.

VARYING WRITING BY PAROL: "A written instrument, plain on its face, cannot be changed into something else by anything the parties said at the time of making it." Lewis v. Traders' Bank, 30 Minn. 134, 14 N. W. 587.

Expert testimony is inadmissible to explain an instrument having a definite legal import. Freeman v. Exchange Bank, 87 Ga. 45, 13 S. E. 160.

erates to transfer the sum named to the payee, because the banker receives the deposit upon a promise, express or implied, to pay the same on the checks of the depositor by whomsoever presented, and, therefore, that the check holder is entitled to the fund against the garnishing creditor of the drawer.¹⁰¹ In decisions to the contrary, it is said that all checks are payable only at the banking house, not in the order in which they are drawn, but in the order in which they are presented for payment, from which it follows that the drawer can defeat any check by drawing out his funds upon subsequent checks first presented, and that garnishment has the same effect.¹⁰²

Payee Has No Rights Till Order is Accepted.

§ 72. It is believed that, with the above exceptions, the holder of a mere order upon the garnished fund has no claim to it which he can maintain against a gar-

¹⁰¹ National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Miller v. Hubbard, 4 Cranch, C. C. 451, Fed. Cas. No. 9,574; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; Roberts v. Austin, 26 Iowa. 315.

STOPPING PAYMENT OF CHECKS: The garnishee having paid his debt to the defendant by check which the latter had transferred for value before the garnishee was served, held, that the check operated as a payment, though the garnishee could and did stop payment of it. National Park Bank v. Levy, 17 R. I. 746, 24 Atl. 777. See, also, post, § 137a.

¹⁰² Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433; Moore v. Davis, 57 Mich. 251, 23 N. W. 800; Lewis v. Traders' Bank, 30 Minn. 134, 14 N. W. 587; Sands v. Mathews, 27 Ala. 399; Kuhn v. Warren Sav. Bank (Pa. Sup.) 11 Atl. 440; Rosenthal v. Mastin Bank, 17 Blatchf. 318, Fed. Cas. No. 12,063; Dolsen v. Brown, 13 La. Ann. 551; Jones v. Pacific Wood, Lumber & Flume Co., 13 Nev. 359, 39 Am. Rep. 308.

UNACCEPTED DRAFT NOT ASSIGNMENT: "The purchaser of a draft is supposed to take it in reliance upon the responsibility of

nishment served between the giving of such order and its acceptance by the drawee.¹⁰³ As soon as a payee of an order receives and the drawee accepts it, the assignment is complete, and the payee takes precedence to subsequent garnishments.¹⁰⁴

What is Assignable—Future Wages and Debts to Accrue.

Things Having No Existence.

§ 73. A thing which has no potential existence cannot be assigned; a mere possibility, not coupled with

the drawer, and he has no other reliance until it is accepted." *Moore v. Davis*, 57 Mich. 255, 23 N. W. 800.

Held, that the holder of a check cannot maintain an action in his own name against the drawees, though they have sufficient funds of the drawer, if they refuse to accept it. *Saylor v. Bushong*, 100 Pa. St. 27, 45 Am. Rep. 352, and note at end of case.

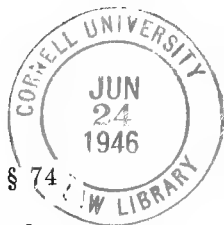
¹⁰³ *Poole v. Carhart*, 71 Iowa, 37, 32 N. W. 16; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210; *Hobson v. Kelly*, 87 Mich. 187, 49 N. W. 533; *Baer v. English*, 84 Ga. 403, 11 S. E. 453; *Jones v. Glover*, 93 Ga. 484, 21 S. E. 50.

PAROL ACCEPTANCE: A. was indebted to B., and B. to C., and C. to D., whereupon B. gave C. the following order on A.: "Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account." A. verbally accepted this order, and soon after D. garnished A. on its judgment against C., and B. appeared as a claimant of the fund. Held that, though A.'s acceptance was not sufficient to bind him, the order operated as an equitable assignment, and D. should recover in the garnishment. *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522.

An acceptance, to be available, must be valid, under the statute of frauds. See post, § 377.

DELIVERY: An acceptance in writing is nugatory unless followed by delivery before the garnishment. *Lehigh Coal & Iron Co. v. Superior Iron & Steel Co.* (Wis.) 64 N. W. 746.

¹⁰⁴ *Little Wolf River Imp. Co. v. Jackson*, 66 Wis. 42, 27 N. W. 625; *Ray v. Faulkner*, 73 Ill. 469; *Johnson v. Pace*, 78 Ill. 143; *Lewis*



any interest, is not assignable; and if the person who acquires title to the property when it afterwards comes into existence, in anticipation of its future existence and his future right to it, affects to assign all his interest in it, no title will pass to the assignee, and he has no claim to it as against a creditor of the owner who has attached it in the hands of a third person by garnishment.¹⁰⁵

Wages to be Earned under Existing Employment.

§ 74. But wages to be earned under an existing contract of employment have such potential existence that the title to them may be passed by assignment before they are earned, and in that case the assignee, and not the plaintiff in garnishment subsequently commenced, is entitled to them.¹⁰⁶ The fact that the pay is to be made by the piece for work done, instead of by the day, week, etc., does not change the rule;¹⁰⁷

v. Board of Com'rs, 14 Colo. 371, 23 Pac. 338; Denver, T. & Ft. W. Ry. Co. v. Smeeton, 2 Colo. App. 126, 29 Pac. 815.

An accepted order for future wages, payable to a firm, gives no rights to the successor of the firm against a garnishment after the wages are earned. Card v. Ahearne (R. I.) 30 Atl. 850.

¹⁰⁵ Mullhall v. Quinn, 1 Gray, 105, 61 Am. Dec. 414; Eagan v. Luby, 133 Mass. 543; Herbert v. Bronson, 125 Mass. 475; Purcell v. Mather, 35 Ala. 570; Lehigh Val. Ry. Co. v. Woodring, 116 Pa. St. 513, 9 Atl. 58, 61. Compare Edwards v. Peterson, 80 Me. 367, 14 Atl. 936.

¹⁰⁶ Brackett v. Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; Emery v. Lawrence, 8 Cush. 151; Tiernay v. McGarity, 14 R. I. 231; Getchell v. Maney, 69 Me. 442; Denver, T. & Ft. W. Ry. Co. v. Smeeton, 2 Colo. App. 126, 29 Pac. 815; Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464.

¹⁰⁷ Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599; Hartley v. Tapley, 2 Gray, 565.

Kane v. Clough, above, contains an elaborate view of the decision upon this subject.

nor that the employment is for an indefinite time or revocable;¹⁰⁸ nor that the rate of wages has been changed since the assignment, and before the garnishment;¹⁰⁹ nor that the assignee, in consideration of the assignment, is to supply the family of the assignor with groceries, etc.¹¹⁰

Invalid and Fraudulent Assignments.

Bona Fides may be Tried in Garnishment.

§ 75. Garnishment is an appropriate proceeding in which to test the good faith and validity of an alleged assignment, and by it the plaintiff is placed in a position to question both.¹¹¹

¹⁰⁸ Thayer v. Kelley, 28 Vt. 19, 45 Am. Dec. 222; Brackett v. Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; Taylor v. Lynch, 5 Gray, 49; Lannan v. Smith, 7 Gray, 150; Wallace v. Walter Heywood Chair Co., 16 Gray, 209; Boylen v. Leonard, 2 Allen, 407; Augur v. New York Belting Co., 39 Conn. 536; Haynes v. Thompson, 80 Me. 125, 13 Atl. 276.

¹⁰⁹ Boylen v. Leonard, 2 Allen, 407.

¹¹⁰ Darling v. Andrews, 9 Allen, 106; Neumann v. Calumet & Hecla M. Co., 57 Mich. 97, 23 N. W. 600; Thayer v. Kelley, 28 Vt. 19, 45 Am. Dec. 222; Sanborn v. Ward, 64 N. H. 611, 6 Atl. 27.

¹¹¹ Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381, 20 N. W. 334; First Nat. Bank v. Knowles, 67 Wis. 373, 389, 28 N. W. 225; Bloodgood v. Meissner, 84 Wis. 452, 54 N. W. 772; Jaseph v. People's Sav. Bank, 132 Ind. 39, 31 N. E. 524; Brainard v. Van Kuran, 22 Iowa, 261, 266; Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa, 618, 57 N. W. 444; Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317; Humphreys v. Atlantic Mill. Co., 98 Mo. 542, 10 S. W. 140; Crane v. Stickles, 15 Vt. 252; Dore v. Dougherty, 72 Cal. 232, 13 Pac. 621; Perego v. Bonesteel, 5 Biss. 69, Fed. Cas. No. 10,977. CONTRA, Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671; Anthony v. Wood, 96 N. Y. 180; Perea v. Colorado Nat. Bank (N. M.) 27 Pac. 322; Huntoon v. Dow, 29 Vt. 215.

Held, that fraud in obtaining judgment in favor of the garnishee

Plaintiff may Recover though Defendant could not.

§ 76. Any person holding property in fraud of the defendant's creditors may be charged as garnishee therefor,¹¹² although the defendant could maintain no action against him.¹¹³ Of course, the garnishee can

against the defendant's assignee in insolvency cannot be tried by garnishment. *Schneider v. Lee* (Or.) 17 Pac. 269.

NO JURISDICTION IN CHANCERY: The case of *Humphreys v. Atlantic Milling Co.*, above, was a creditors' bill in equity before judgment obtained against the debtor; and the court held that it could not be sustained, because the remedy at law had not been exhausted, and garnishment affords a speedy and ample relief in all such cases.

EQUITABLE ISSUES NOT INVOLVED: Such cases do not necessarily raise the question whether a mere equitable right can be attached, for a fraudulent transfer is void at law as well as in equity, and creditors have their legal remedies to annul the covinous title. *Custer v. Steever*, 36 N. J. Law, 304; *Kelley v. Andrews* (Iowa) 62 N. W. 853.

ATTACHMENT A BETTER REMEDY: "The plaintiff, by attaching the debt, was entitled to raise the question of the fraudulent or fictitious character of Lovejoy's claim thereto, but, having failed to attach the mortgaged property, is not in a position to object that such a claim was invalid because the mortgage was not filed." *Coykendall v. Ladd*, 32 Minn. 529, 21 N. W. 733.

JURISDICTION: Any court otherwise competent may entertain proceedings to test the validity of the assignment, as well as the one in which the assignee for creditors has filed his bond. *Kohn v. Ryan*, 31 Fed. 636; *Rothschild v. Hasbrouck*, 65 Fed. 283.

PLAINTIFF AFFIRMING SALE CANNOT CHARGE FRAUD: When the plaintiff attempts to charge the garnishee as debtor, and not for property in his hand, the sale is thereby affirmed, and cannot be attacked for fraud. *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447; *Sayers v. Kent* (Pa. St.) 1 Atl. 442; *Bishop v. Catlin*, 28 Vt. 71; *Woodward v. Wyman*, 53 Vt. 645.

¹¹² *Enos v. Tuttle*, 3 Conn. 27; *Sutton v. Hasey*, 58 Wis. 556, 17 N. W. 416; *Hooper v. Hills*, 9 Pick. (Mass.) 435.

¹¹³ *Hawes v. Mooney*, 39 Conn. 37; *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89 Iowa, 618,

never set up his own fraud as a defense;¹¹⁴ but there are decisions to the effect that the plaintiff can complain only of frauds to which the defendant is a party, and not of those practiced upon the latter by the garnishee.¹¹⁵ If the garnishee had disposed of the property before being summoned, he may be charged for the proceeds then in his possession.¹¹⁶

No Matter Who Claims to Own It.

§ 77. It makes no difference as to his liability whether the garnishee claims to own the property him-

57 N. W. 445; *Healey v. Butler*, 66 Wis. 9, 17, 27 N. W. 822; *Barker v. Lynch*, 75 Wis. 624, 629, 44 N. W. 826; *E. B. Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Lee v. Tabor*, 8 Mo. 322; *Lackland v. Garesche*, 56 Mo. 267; *Eyerman v. Krieckhaus*, 7 Mo. App. 455; *Joseph v. People's Sav. Bank*, 132 Ind. 39, 31 N. E. 524; *Henry v. Murphy*, 54 Ala. 246; *Van Ness v. McLeod*, 2 Idaho, 1147, 31 Pac. 798; *Fearey v. Cummings*, 41 Mich. 378, 1 N. W. 946.

CANNOT COMPLAIN OF FRAUD ON OTHERS: "The plaintiff's right to recover goods or their value from Treusch [garnishee] was wholly dependent on Lustig's [defendant's] title to them and ownership of them. It was not material, as an ultimate fact, in this controversy, that the Treusch Bros. conspired with Lustig to defraud the persons from whom the goods held by Treusch were purchased. The persons thus defrauded could, of course, recover in trover the value of the goods from the Treusch Bros. as transferees with knowledge of the fraud." *Gumberg v. Treusch* (Mich.) 61 N. W. 872. But see *Treusch v. Ottenburg*, 4 C. C. A. 629, 54 Fed. 867.

A DONATIO CAUSA MORTIS may be garnished in a suit against an administrator for a debt of the decedent. *Harmon v. Osgood*, 151 Mass. 501, 24 N. E. 401.

¹¹⁴ *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933.

¹¹⁵ *Goddard v. Guittar*, 80 Iowa, 129, 45 N. W. 729; *Garretson v. Kane*, 27 N. J. Law, 208; *Curtis v. Steever*, 36 N. J. Law, 304, 308. See, also, *Kingman v. Perkins*, 105 Mass. 111. But compare section 48, ante; *Lovejoy v. Lee*, 35 Vt. 430.

¹¹⁶ PROCEEDS OF PROPERTY DISPOSED OF: *Hawes v. Moon-ey*, 39 Conn. 37; *Risser v. Rathburn*, 71 Iowa, 113, 32 N. W. 198;

self, and has title in his own name,¹¹⁷ or whether title is in a stranger, whom he supposes to be the real owner,¹¹⁸ or whether he holds it as trustee, under a deed of

Joseph v. People's Sav. Bank, 132 Ind. 39, 31 N. E. 524; *Keep v. Sanderson*, 12 Wis. 352, 362, 60 Am. Dec. 404; *Gutterson v. Morse*, 58 N. H. 529; *Proctor v. Lane*, 62 N. H. 457; *Heineman v. Schloss*, 83 Mich. 153, 47 N. W. 107; *Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735; *Treusch v. Ottenburg*, 4 C. C. A. 629, 54 Fed. 867.

Before the question was covered by statute, it was held in Michigan that no recovery could be had for the proceeds of property sold. *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946; *Folkerts v. Standish*, 55 Mich. 463, 21 N. W. 891; *Bethel v. Linn*, 63 Mich. 464, 468, 30 N. W. 84.

INTEREST ON the proceeds may be recovered from the time of conversion. *Risser v. Rathburn*, *supra*.

EXCEPTION: Of course, no recovery can be had against a garnishee for proceeds disposed of by him bona fide in a manner binding on the defendant before the garnishment. *Stickney v. Crane*, 35 Vt. 89.

The garnishee, having taken possession of certain property under a bill of sale as security, and having taken a mortgage upon other property, sold all his interest therein, and his entire claim against the defendant, to a third person, through the defendant as agent, before the garnishment summons was served. The court held that the garnishee, having sold his interest in the property and parted with possession and control of it, and applied the proceeds to the payment of the defendant's debt to him before service of the garnishment summons, he cannot be charged, whether the mortgage and bill of sale were valid or invalid, or his possession was lawful or unlawful, as against the other creditors of the defendant. *Jones v. Keller* (Wis.) 65 N. W. 732. See, also, *ante*, § 52.

¹¹⁷ *Robinson v. Smith*, 63 Mich. 350, 29 N. W. 858; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946; *Cummings v. Fearey*, 44 Mich. 39, 6 N. W. 98; *Treusch v. Ottenburg*, 4 C. C. A. 639, 54 Fed. 867; *Warder v. Baker*, 67 Wis. 409, 30 N. W. 932; *Cowles v. Coe*, 21 Conn. 220.

¹¹⁸ *Connor v. Third Nat. Bank*, 90 Mich. 328, 51 N. W. 523; *National Bank v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221; *Patton v.*

general assignments for the benefit of defendant's creditors.¹¹⁹

Pleadings—Proofs—Defenses.

§ 78. In such cases it is not necessary for the plaintiff to allege fraud in his pleadings anywhere, but evidence of the facts may be given on the trial;¹²⁰ and the garnishee who is a party to the fraudulent purpose cannot maintain even such defenses as he would be justly entitled to between him and the defendant;¹²¹

Gates, 67 Ill. 164. Contra, Gibson v. National Park Bank, 98 N. Y. 87; Himsted v. German Bank, 46 Ark. 537.

¹¹⁹ Farrington v. Sexton, 43 Mich. 454, 5 N. W. 654; Blake v. Hubbard, 45 Mich. 1, 7 N. W. 204; Richardson v. Rogers, 45 Mich. 591, 8 N. W. 526; Folkerts v. Standish, 55 Mich. 463, 21 N. W. 891; Atkinson v. Weidner, 79 Mich. 575, 583, 44 N. W. 1042; Black v. Dawson, 82 Mich. 485, 46 N. W. 793; Banning v. Sibley, 3 Minn. 389 (Gil. 282, 295); Stein v. La Dow, 13 Minn. 381; May v. Walker, 35 Minn. 194, 28 N. W. 252; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; Kimball v. Evans, 58 Vt. 655; Stickney v. Crane, 35 Vt. 89; Vernon v. Upson, 60 Wis. 418, 19 N. W. 400; Grever v. Culver, 84 Wis. 295, 54 N. W. 585; Kohn v. Ryan, 31 Fed. 636.

In Minnesota it is held that, if the assignment for benefit of creditors is valid upon its face, garnishment does not lie. Second Nat. Bank v. Schranck, 43 Minn. 38, 44 N. W. 524.

DISBURSEMENTS: If the assignee acted in good faith, he should be allowed to retain his necessary expenses out of the property, though the assignment was void. Haydock Carriage Co. v. Pier, 78 Wis. 579, 47 N. W. 945; Noyes v. Brent, 5 Cranch, C. C. 551, Fed. Cas. No. 10,372; Bishop v. Catlin, 28 Vt. 71.

¹²⁰ See post, § 358.

¹²¹ Cummings v. Fearcy, 44 Mich. 39, 6 N. W. 98; St. Louis Brokerage Co. v. Cronin, 14 Mo. App. 586.

A garnishee having received a conveyance from defendant absolute on its face, but by agreement between him and defendant that it should be for security only between themselves, and absolute against creditors, held that the garnishee should be charged unconditionally. Thompson v. Pennell, 67 Me. 159.

A case arose in Ohio in which one of the garnishees took an assign-

but he cannot be charged as a wrongful holder unless his holding is actually wrongful.¹²² Though the garnishee may have taken of the defendant a mortgage void as to creditors of the defendant, he cannot be charged unless he has received property. It is the receipt of property, and not the taking of the mortgage, that makes the garnishee liable.¹²³

Fraud a Question of Fact.

§ 79. In this, as in all other proceedings when the facts are undisputed, fraud is a conclusion of law from the facts proved;¹²⁴ otherwise, it is a question of fact, and the burden of proof is on the plaintiff;¹²⁵ but the greatest latitude of evidence should be allowed when

ment of a stock of goods from the defendant for the purpose of defrauding the latter's creditors, and, in payment for the same, gave the defendant his note, which the defendant immediately assigned for value to the other garnishee, who was also aware of the fraudulent purpose. After the garnishees were summoned, the plaintiff and other creditors of the defendant seized and sold the goods under attachment, and then sought to get their value in the garnishment suit. The court said: "They may pursue the property in the hands of the fraudulent vendee, and cause the same to be sold for their benefit, or they may compel the vendee to account for its value. If they obtain either the property or its value from the vendee, their rights as to that property are exhausted. * * * They cannot obtain from the vendee both the property and its value in money. That would be a double remedy. * * * It is not necessary to determine in this case what would be the rights or liabilities of a fraudulent vendee, when complicated by the claim of one creditor pursuing the property of his debtor, with that of another seeking to recover of him its price or value only." *Bradford v. Beyer*, 17 Ohio St. 389, 394.

¹²² *Lyon v. Ballentine*, 63 Mich. 97, 104, 29 N. W. 837.

¹²³ See ante, § 52, and post, § 175.

¹²⁴ *Pettibone v. Stevens*, 15 Conn. 19, 38 Am. Dec. 57; *Beers v. Botsford*, 13 Conn. 146; *Long v. Martin*, 15 Mich. 60.

¹²⁵ *Bethel v. Linn*, 63 Mich. 464, 468, 30 N. W. 84; *Hewitt v. Wagar*,

fraud is sought to be shown.¹²⁶ Ordinarily, it is bad faith which avoids the transfer, and therefore the intent is the gist of the inquiry.¹²⁷

Badges of Fraud.

§ 80. Gross insufficiency of consideration for the transfer, or uncertainty of it,¹²⁸ lack of candor, and attempts to suppress and conceal the facts, and secret defeasances back to the grantor,¹²⁹ any of these and many others are strong presumptive evidences of fraud, and sufficient to cast upon the garnishee or claimant the burden of making a satisfactory explanation;¹³⁰ and, failing to do so, the garnishee should be

Lumber Co., 38 Mich. 701; Treusch v. Ottenburg, 4 C. C. A. 629, 54 Fed. 867; Hecht v. Green, 61 Cal. 269; Perea v. Colorado Nat. Bank (N. M.) 27 Pac. 322.

MEASURE OF BURDEN OF PROOF: "The court further instructed the jury that 'the proof to establish fraud must be clear and convincing.' * * * The words 'clear proof' and 'hearty conviction' are apt to mislead. Proof of facts and circumstances is sufficiently clear if it creates a belief that a fraud has been perpetrated, and a conviction so produced is sufficiently hearty to predicate a verdict upon." Gumberg v. Treusch (Mich.) 61 N. W. 872.

¹²⁶ North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381, 20 N. W. 334; Cummings v. Fearey, 44 Mich. 39, 6 N. W. 98; Gumberg v. Treusch (Mich.) 61 N. W. 872; E. B. Millar & Co. v. Plass, 11 Wash. 237, 39 Pac. 956; Henny Buggy Co. v. Patt, 73 Iowa, 485, 35 N. W. 587.

¹²⁷ Spear v. Rood, 51 Mich. 140, 16 N. W. 312; Stein v. Hermann, 23 Wis. 132; Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881.

¹²⁸ Stein v. Hermann, 23 Wis. 132; Spear v. Rood, 51 Mich. 140, 16 N. W. 312; Meigs v. Weller, 90 Mich. 629, 634, 51 N. W. 681; Stevens v. Dillman, 86 Ill. 233.

¹²⁹ Meigs v. Weller, 90 Mich. 629, 634, 51 N. W. 681.

¹³⁰ Treusch v. Ottenburg, 4 C. C. A. 629, 54 Fed. 868; Hart v. Rafter, 78 Ga. 478, 3 S. E. 699.

charged.¹⁸¹ The presence of apparent consideration is of little significance.¹⁸²

Facts Raising Conclusive Presumption of Fraud.

§ 81. But there are certain facts from which the law raises a conclusive presumption of fraud,—such as failure to record a mortgage, or take possession of the property;¹⁸³ a total absence of consideration;¹⁸⁴ and, in assignments for the benefit of creditors, keeping part of his property by the defendant, although the deed of assignment in terms is broad enough to cover all;¹⁸⁵ or giving the assignee power to sell on credit;¹⁸⁶ or failure to secure all his creditors equal rights under the assignment.¹⁸⁷ But statutes forbidding preferences in assignments for the benefit of creditors do not apply to assignments made out of the state. If these are valid where made, they are valid anywhere.¹⁸⁸ Statutes prohibiting preferences in as-

¹⁸¹ Meigs v. Weller, 90 Mich. 629, 634, 51 N. W. 681.

¹⁸² Frisk v. Reigelman, 75 Wis. 499, 504, 43 N. W. 1117.

¹⁸³ Sanger v. Guenther, 73 Wis. 354, 41 N. W. 436; Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; Crippen v. Fletcher, 56 Mich. 386, 23 N. W. 56; Folkerts v. Standish, 55 Mich. 463, 21 N. W. 891; Coykendall v. Ladd, 32 Minn. 529, 21 N. W. 733.

Mortgage on intangible property need not be recorded. Lawrence v. McKenzie, 88 Iowa, 432, 55 N. W. 505.

¹⁸⁴ Beck v. Cole, 16 Wis. 101.

¹⁸⁵ Farrington v. Sexton, 43 Mich. 454, 5 N. W. 654.

¹⁸⁶ Truitt v. Caldwell, 3 Minn. 364 (Gil. 257), 74 Am. Dec. 764; Richardson v. Rogers, 45 Mich. 591, 8 N. W. 526; Keep v. Sanderson, 2 Wis. 42, 12 Wis. 352; Lord v. Devendorf, 54 Wis. 491, 11 N. W. 903; Harvey v. Mix, 24 Conn. 406.

¹⁸⁷ Atkinson v. Weidner, 79 Mich. 575, 583, 44 N. W. 1042; Harvey v. Mix, 24 Conn. 406.

¹⁸⁸ Butler v. Wendell, 57 Mich. 62, 23 N. W. 460; Mowry v. Crocker,

signments for the benefit of creditors do not apply to the conveyances of defendant's property to certain of his creditors, to the exclusion of all others,¹³⁹ unless it is substantially an assignment of all his property to creditors; for effect should be considered, rather than form.¹⁴⁰

6 Wis. 326; *Burdseye v. Baker*, 82 Ga. 142, 7 S. E. 864; *Clark v. Connecticut Peat Co.*, 35 Conn. 303. But see *Guillander v. Howell*, 35 N. Y. 657; *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395.

¹³⁹ *Smyth v. Ripley*, 33 Conn. 306; *Neumann v. Calumet & Hecla Min. Co.*, 57 Mich. 97, 106, 23 N. W. 600; *Whitfield v. Stiles*, 57 Mich. 410, 24 N. W. 119; *Gage v. Chasebro*, 49 Wis. 486, 5 N. W. 881; *Spear v. Rood*, 51 Mich. 140, 16 N. W. 312; *Austin v. First Nat. Bank*, 100 Mich. 613, 59 N. W. 597; *Greene & Button Co. v. Remington*, 72 Wis. 648, 654, 39 N. W. 767.

¹⁴⁰ *Kimball v. Evans*, 58 Vt. 655; *Woodward v. Wyman*, 53 Vt. 645; *Winner v. Hoyt*, 66 Wis. 227, 239, 28 N. W. 380; *Bebb v. Preston*, 1 Iowa, 460, 3 Iowa, 325; *Letts, Fletcher & Co. v. McMaster*, 83 Iowa, 449, 49 N. W. 1035; *Atkinson v. Weidner*, 79 Mich. 575, 583, 44 N. W. 1042.

CHAPTER IV.

STATUTES EXEMPTING CERTAIN PROPERTY AND CREDITS FROM GARNISHMENT.

- § 82. What Property and Credits are Exempt.
- 83. Exemption—How Claimed—An Absolute Right Indefeasible.
- 84. — A Privilege to be Claimed and Proved.
- 85. — Whether Right or Privilege, Defendant may and Garnishee should Claim.
- 86. Exemption—How Waived.
- 87. Wages, Personal Earnings, Laborers, Householders, etc., Defined—Terms Liberally Construed.
- 88. — Householders and Heads of Families.
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- 92. Exemption not Affected by Residence.
- 93. Limitation of Right to Claim Exemption—Courts cannot Impose.
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- 98. Proceeds of Exempt Property Destroyed or Converted without Owner's Consent.
- 99. Personal Earnings and Pension Money Exempt after Payment.
- 100. Exemption Laws have No Force Out of the State.
- 101. — Limitation of Rule.
- 102. Remedy of Persons Defrauded of Their Exemption—May Recover from Creditor.
- 103. — May Enjoin Threatened Wrong.
- 104. Suits in Different States—Double Liability of Garnishee—Garnishment in Another State as a Defense.
- 105. — Whether Ground for Continuance or Plea in Bar.
- 106. — Pleading Exemption in Other States.
- 107. — Extent and Reason of Protection.

What Property and Credits are Exempt.

§ 82. No person can be charged as garnishee by reason of having in his possession or under his control property belonging to the defendant which is by law exempt from sale on execution. Property exempt from execution is exempt also from garnishment.¹ Besides this, the garnishment statutes all contain provisions exempting certain property and credits, principally wages, from liability to garnishment.² The peculiar provisions of these statutes can be ascertained only by examination, and each practitioner is referred to the statutes of his own state. Besides these, the

¹ *Wilson v. Bartholomew*, 45 Mich. 41, 7 N. W. 227; *Davenport v. Swan*, 9 Humph. (Tenn.) 186; *Staniels v. Raymond*, 4 Cush. 314; *Brainard v. Simmons*, 67 Iowa, 646, 25 N. W. 844; *Fanning v. First Nat. Bank*, 76 Ill. 53; *Bradley v. Byerley* (Kan. App.) 42 Pac. 930; *Parks v. Cushman*, 9 Vt. 320; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131; *Sanb. & B. Ann. St. Wis.* § 2982, div. 15.

PURCHASE PRICE OF EXEMPT PROPERTY: Money paid on a contract to buy household furniture which, when purchased, would be exempt, is liable to garnishment when title to the property contracted for has not passed. *Edson v. Trask*, 22 Vt. 18.

MONEY EXEMPT TO CERTAIN AMOUNT AS PROPERTY: Under statutes exempting personal property to a certain amount from execution without specifying that it shall be of any particular kind, it is held that money due on a judgment may be selected by the debtor, and held exempt from garnishment. *Mace v. Heath*, 34 Neb. 54, 51 N. W. 317. In the same manner, under such statutes, money in the bank or otherwise due the defendant may be claimed as exempt. *Chilcote v. Conley*, 36 Ohio St. 545; *Fanning v. First Nat. Bank*, 76 Ill. 53; *Emerson & Fisher Co. v. Marshall*, 4 Ind. App. 265, 30 N. E. 1099. Compare *Miller v. Mahoney* (Ky.) 29 S. W. 879. Contra, by statute, *Finlen v. Howard*, 126 Ill. 259, 18 N. E. 560.

² The various exemption clauses of the garnishment statutes will be found reviewed in *Freeman on Executions* (section 234), and note in 91 Am. Dec. 411.

United States statutes provide that "no sums of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."³

Exemption—How Claimed.

An Absolute Right Indefeasible.

§ 83. In some states the statutes absolutely exempt certain property from the operation of the garnishment laws, and it is held that the garnishee submits to judgment for the same at his peril, although the defendant has not claimed the exemption; for, inasmuch as there is no authority for the garnishment either in the statutes or out of them, his liability to the defendant continues.⁴ Besides these, there are numerous decisions to the effect that, if the garnishee does not claim the exemption, payment of the garnishment judgment will constitute no defense to a suit against him by the exemptionist.⁵

³ Rev. St. U. S. § 4747.

⁴ *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 650, 57 N. W. 1050; *Jones v. Whiteselle* (Tex. Civ. App.) 29 S. W. 177.

⁵ *Pierce v. Chicago & N. W. Ry. Co.*, 36 Wis. 283; *Chicago & A. Ry. Co. v. Ragland*, 84 Ill. 375; *Lock v. Johnson*, 36 Me. 464; *Terre Haute & I. Ry. Co. v. Baker*, 122 Ind. 433, 24 N. E. 85; *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639; *Chicago, St. L. & P. Ry. Co. v. Meyer* (Ind. Sup.) 13 N. E. 576; *Mace v. Heath*, 34 Neb. 54, 790, 51 N. W. 317, 822; *Watkins v. Cason*, 46 Ga. 444; *The City of New Bedford*, 20 Fed. 57.

A Privilege to be Claimed and Proved.

§ 84. In other states the exemption is held not to be a right, but a mere privilege, which must be claimed in season,⁶ and in the proper manner,⁷ or it will be considered as waived; and in these states, at least, the debt or property must be shown under proper allegations and issue formed to be exempt, and it will not be presumed to be so.⁸

° WHEN EXEMPTION MAY BE CLAIMED: A claim of exemption to avail anything must precede judgment of condemnation. *White v. Hobart*, 90 Ala. 368, 7 South. 807; *Randolph v. Little*, 62 Ala. 396. *Contra*, *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139. Compare *Hiff v. Arnott*, 31 Kan. 672, 3 Pac. 525.

"It will hardly be contended that the defendant has forfeited or waived that privilege until he has had notice of the garnishment proceedings." *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388.

It is absolutely in the discretion of the court whether it will allow a claim of exemption to be made after the claimant is in default. *Buckland v. Tonsmere*, 90 Ala. 503, 8 South. 68.

Claim of exemption made when the garnishee files his answer is in time. *Kuhn v. Warren Sav. Bank* (Pa. Sup.) 11 Atl. 440.

A claim of exemption after the money in court has been paid over to the plaintiff is too late. *State v. Judge*, 39 La. Ann. 622, 2 South. 425.

7 Held, that the garnishee cannot claim the exemption for the defendant. *Conley v. Chilcote*, 25 Ohio St. 320, 324, 36 Ohio St. 545; *Osborne v. Schutt*, 67 Mo. 712. Compare *Moore v. Chicago, R. I. & P. Ry. Co.*, 43 Iowa, 385.

Held, that the claim of exemption in the garnishee's answer, and a stipulation signed by him and the plaintiff stating that the defendant claims it, do not satisfy the statute requiring a verified claim by the defendant himself. *Courie v. Godwin*, 89 Ala. 569, 8 South. 9.

AFTER EXPRESS WAIVER: When the defendant expressly waives his exemption, the garnishee cannot afterwards urge it. *Yates v. Hurst*, 41 Vt. 556.

8 *Baer v. Otto*, 34 Ohio St. 11; *Oakes v. Marquardt*, 49 Iowa, 643; *Leighton v. Heagerty*, 21 Minn. 42, 46; *Donnelly v. O'Connor*, 22 Minn. 309; *Rollins v. Allison*, 59 Vt. 188, 10 Atl. 201.

ALLEGATION OF EXEMPTION AND TRIAL OF CLAIM: As

Whether a Right or a Privilege, Defendant may and Garnishee should Claim.

§ 85. But, whether it is a right or a privilege, it is well settled that the defendant may claim his exemption rights in the garnishment suit,⁹ or appeal from

to what is a sufficient affidavit of the defendant that the debt was exempt from garnishment, see *Porter v. Navin*, 52 Ark. 352, 12 S. W. 705; *Ware v. Laird*, 93 Ga. 342, 20 S. E. 635. In the case of *Ware v. Laird* the court held that, when a sufficient claim of exemption is made by the defendant, there is no need to raise that issue upon the answer of the garnishee, but the plaintiff should then be allowed to proceed to trial, and condemn the fund if he can. Further, as to what must be stated in the claim of exemption, see *Smith v. Chicago & N. W. Ry. Co.*, 60 Iowa, 312, 14 N. W. 335.

The plaintiff may oppose the claim by counter affidavits. *Baer v. Otto*, 34 Ohio St. 11.

The proper manner of claiming the exemption under the Alabama statute is detailed in *Tonsmere v. Buckland*, 88 Ala. 312, 6 South. 904.

When the claim of exemption is not contested, no judgment can be rendered against the garnishee for the claimed property. *Young v. Louisville & N. Ry. Co.*, 95 Ala. 454, 11 South. 121; *Muzzy v. Lantry*, 30 Kan. 49, 2 Pac. 102.

NECESSITY OF SECOND CLAIM ON APPEAL: Under a statute allowing the garnishee to be charged for any indebtedness or other liability accruing up to the time he makes answer, it was held that, although a claim of exemption was properly made and allowed in justice court, a new claim must be made for any liability accruing between the time of the first trial and the answer being filed by the garnishee on plaintiff's demand in the appellate court. *Craft v. Louisville & N. Ry. Co.*, 93 Ala. 22, 9 South. 328.

IN MISSOURI a justice of the peace has no jurisdiction in a case of garnishment to determine the defendant's exemption rights, and it is the duty of the officer holding the execution to apprise him what they are, and turn over to him whatever exempt property is received from the garnishee. *State v. Barnett*, 96 Mo. 133, 8 S. W. 767; *State v. Barada*, 57 Mo. 562.

⁹ *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 655, 57 N. W. 1050; *Chilcote v. Conley*, 36 Ohio St. 545; *Curran v. Fleming*, 76 Ga. 98; *Wales v. City of Muscatine*, 4 Iowa, 302.

the decision rendered therein;¹⁰ and, if he does not, it is not only the garnishee's right, but his duty, in most of the states, to claim and defend the exemption for him.¹¹

¹⁰ *Wilson v. Bartholomew*, 45 Mich. 41, 7 N. W. 227; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 655, 57 N. W. 1050; *Wigwall v. Union Coal Min. Co.*, 37 Iowa, 129; *Webster v. City of Lowell*, 2 Allen, 123.

¹¹ *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050; *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639; *Winterfield v. Milwaukee & St. P. Ry. Co.*, 29 Wis. 589; *Pierce v. Chicago & N. W. Ry. Co.*, 36 Wis. 283, 287; *Mineral Point Ry. Co. v. Barron*, 83 Ill. 365; *Chicago & A. Ry. Co. v. Ragland*, 84 Ill. 375; *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388; *Missouri Pac. Ry. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *Terre Haute & I. Ry. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; *Chicago, St. L. & P. Ry. Co. v. Meyer* (Ind. Sup.) 13 N. E. 576; *Wright v. Chicago, B. & Q. Ry. Co.*, 19 Neb. 175, 27 N. W. 94; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 740, 36 N. W. 140; *Mace v. Heath*, 34 Neb. 54, 790, 51 N. W. 317, and 52 N. W. 822; *Clark v. Averill*, 31 Vt. 512, 515, 76 Am. Dec. 131; *Lock v. Johnson*, 36 Me. 464; *Emmons v. Southern Bell Tel. Co.*, 80 Ga. 760, 7 S. E. 232; *Brainard v. Shannon*, 60 Me. 342; *Staniels v. Raymond*, 4 Cush. 314; *Gery v. Ehrgood*, 31 Pa. St. 329.

ONLY DEFENDANT CAN CLAIM EXEMPTION: There are a few decisions to the effect that the exemption cannot be claimed by the garnishee. See ante, § 84, note 7.

DEFENDANT SHOULD BE CALLED: After disclosing the exemption, the garnishee should have the defendant cited in to defend also. *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639.

WHEN THE DEFENDANT KNOWS OF THE PROCEEDING, and delivers his affidavit of exemption to the garnishee, who files the same, and the defendant does not ask him to make any other defense, he is under no obligation to make any. *Chicago, St. L. & P. Ry. Co. v. Meyer*, 117 Ind. 563, 19 N. E. 320.

IN IOWA: "The whole proceeding being based upon the statute, we would hesitate long before holding that there are other and greater obligations or duties resting upon a garnishee than those imposed by statute. The law, as it is, imposes inconvenience enough on a garnishee without enlarging its provisions by judicial construc-

Exemption—How Waived.

§ 86. Unless the statute creating the exemption so provides, no valid waiver of its benefits can be made in advance by executory agreement.¹² The delivery of

tion." *Moore v. Chicago, R. I. & P. Ry. Co.*, 43 Iowa, 385. "Whether the garnishee is bound or privileged to set up the fact that the money in his hands is exempt from execution or attachment against the debtor, or to notify the debtor of the garnishment in cases where the debtor could successfully plead the exemption, has not been determined in this state. * * * What is said on this subject in *Moore v. Chicago, R. I. & P. Ry. Co.*, before cited, by way of argument, cannot be regarded as authority, and we prefer to reserve a ruling on this question until its determination is required." *Leiber v. Union Pac. Ry. Co.*, 49 Iowa, 688. See, also, *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850.

¹² *Mills v. Bennett*, 94 Tenn. 651, 30 S. W. 748; *Moxley v. Ragan*, 10 Bush (Ky.) 156, 19 Am. Rep. 61; *Levicks v. Walker*, 15 La. Ann. 245, 9 Am. Law Reg. 112, 77 Am. Dec. 187; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Burke v. Finley*, 50 Kan. 424, 31 Pac. 1065; *Branch v. Thompson*, 77 N. C. 388; *Traders' Ins. Co. v. Chase* (Tex. Civ. App.) 31 S. W. 1103.

EXECUTORY WAIVER: To hold otherwise would allow "weak debtors to beggar their families in behalf of sharp and grasping creditors. * * * It is to be observed that the garnishee has rights in the premises, and he is under the act of the assembly, but is not a party to the agreement which his laborer makes with a creditor. Why should he be annoyed and subjected to costs, his work hindered, and his hands deprived of their daily bread, by an agreement between others to which he is not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees, instead of a statute which they knew of when they made their business arrangements and employed their laborers, and which they had a right to expect would be administered as it is written?" *Firmstone v. Mack*, 49 Pa. St. 387, 88 Am. Dec. 507.

"Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would therefore be apt to

property by a garnishee to an officer to be sold is no waiver of the exemption, for the obvious reason that the garnishee has no authority to waive anything but his own rights.¹³ Subject to the decisions cited in the last preceding section, to the effect that the exemption is waived by not claiming it, it is not lost until the exemptionist has waived it by some unequivocal act or declaration;¹⁴ and the exemption may be claimed either by the garnishee or the defendant after judgment has been rendered against the former, and he has paid the money into court in satisfaction of it, and at any time before payment of it to the plaintiff, at least in the absence of any showing that it could have been made before.¹⁵

object to a clause subjecting all his property to levy on execution in case of nonpayment. It was against the consequences of such overconfidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose. * * * One object of the legislature was to promote the comfort of families, and to protect them against the improvidence of their head." *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186.

¹³ *Fanning v. First Nat. Bank*, 76 Ill. 53; *Smith v. Johnson*, 71 Ga. 748; *Cox v. Bearden*, 84 Ga. 304, 10 S. E. 627.

The defendant's right to his exemption is not lost by the failure of the garnishee to answer or claim it. *Jones v. Tracy*, 75 Pa. St. 417.

¹⁴ *Kansas City, St. J. & B. C. Ry. Co. v. Gough*, 35 Kan. 1, 10 Pac. 89, 93.

¹⁵ *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139. Compare *Smith v. Johnson*, 71 Ga. 748.

Wages, Personal Earnings, Laborers, Household-ers, etc., Defined.

Terms Liberally Construed.

§ 87. These and similar terms appear in the statutes declaring what credits shall be free from the demands of creditors in garnishment proceedings, and in favor of what persons the exemption shall be allowed, and are used in substantially the same sense as they are in the statutes exempting property from execution.¹⁶ The policy of the law—the intent of the legislature in enacting these provisions—is too plain for argument. It was to secure to those who toil with their hands, or depend for their subsistence upon their personal earnings, a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life and a few of the conveniences of modern civilization, free from the merciless grasp of their less needy creditors. The constantly increasing numbers of those who work for hire, and the endless variety of positions which they occupy, have entailed considerable litigation in determining what classes of persons are within the meaning of the statute. Hardly any two statutes express this purpose in the same terms or confine it within the same limits, and therefore about all that can be done here is to show by illustration that the courts have regarded the spirit rather than the terms of the statute.

¹⁶ See Freem. Ex'ns, §§ 222-234.

Householders and Heads of Families.

§ 88. Some of the statutes extend the benefits of the provisions only to householders or heads of families.¹⁷ Under such provisions, personal earnings exempt to any householder may be claimed by a man who is not keeping house or living with his family, but who has a wife and children in Canada, depending upon him for support;¹⁸ and an unmarried man living with and supporting his widowed mother is entitled to his personal earnings as the head of a family;¹⁹ so is a woman who supports her invalid husband and family;²⁰ so is an unmarried man keeping house with his sister, and partly supporting his younger brothers and sisters, though his mother, living elsewhere, also contributes to their support;²¹ so is a widower who keeps a domestic, and whose son and son's wife live with him without paying board.²² But a married man, having no children, and separated from his wife, is not,²³ especially when the statute requires that the exemptionist shall reside with his family;²⁴ nor is a

¹⁷ McLarty v. Tibbs, 69 Miss. 357, 12 South. 557.

¹⁸ Pettit v. Muskegon Booming Co., 74 Mich. 214, 41 N. W. 900; Lowry v. McAllister, 86 Ind. 543. Compare State v. Finn, 8 Mo. App. 261; Seaton v. Marshall, 6 Bush (Ky.) 429, 99 Am. Dec. 683; Pearson v. Miller, 71 Miss. 379, 14 South. 731.

¹⁹ State v. Kane, 42 Mo. App. 253; Parsons v. Livingston, 11 Iowa, 104, 77 Am. Dec. 135. Contra, Riley v. Hitzler, 49 Ohio St. 651, 32 N. E. 753.

²⁰ Schaller v. Kurtz, 25 Neb. 655, 41 N. W. 642.

²¹ Duncan v. Frank, 8 Mo. App. 286. But see Blake v. Bolte (City Ct. N. Y.) 30 N. Y. Supp. 209; Id. (Com. Pl.) 31 N. Y. Supp. 124.

²² Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469.

²³ Spengler v. Kaufman, 43 Mo. App. 5; Linton v. Crosby, 56 Iowa, 386, 9 N. W. 311.

²⁴ Wabash Ry. Co. v. Dougan, 41 Ill. App. 543, affirmed, on another point, in 142 Ill. 248, 31 N. E. 594.

single man who helps support his sister in another state.²⁵ Ordinarily, a family embraces a collective body of persons, generally relatives and servants, living together in one house or curtilage, and does not embrace separate individuals who have no common home.²⁶

Wages, Salary, Personal Earnings, etc.

§ 89. The manifest object of the statutes is to exempt the personal earnings of the defendant, as contradistinguished from any income or profits derived from speculative, mercantile, or other business transactions;²⁷ and it makes no difference by what means they are reckoned or ascertained, or what they may be termed.²⁸ "If there is any difference, in the popular sense, between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. * * * A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs on errands, but he compensates his salesman or clerk by a salary."²⁹ It is immaterial whether the wages agreed to be paid are measured by time, or by the piece, or by the ton or other standard.³⁰ Money earned by defendant as superintendent of construction of a building, and reckoned at a certain per cent. of the cost of the

²⁵ *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

²⁶ *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747; *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469; *Arnold v. Waltz*, 53 Iowa, 706, 6 N. W. 40; *Pearson v. Miller*, 71 Miss. 379, 14 South. 731.

²⁷ *Shelly v. Smith*, 59 Iowa, 453, 13 N. W. 419.

²⁸ *Hamberger v. Marcus*, 157 Pa. St. 133, 27 Atl. 681.

²⁹ *Hamberger v. Marcus*, 157 Pa. St. 133, 27 Atl. 681.

³⁰ *Seider's Appeal*, 46 Pa. St. 57; *Hamberger v. Marcus*, 157 Pa. St. 133, 27 Atl. 681; *Wentroth's Appeal*, 3 Wkly. Notes Cas. 248.

building, is plainly wages for his personal services.³¹ Money due a photographer for work done by himself is within the term "personal earnings."³² Money due a physician for services under an employment by a city at \$30 per day to attend smallpox cases is exempt as current wages;³³ but a lawyer's fees for legal services in a single case are not.³⁴ The charges of a blacksmith for work done for his customers are not wages;³⁵ and an income which is figured upon the profits and losses of a mercantile business is not a salary.³⁶

Combining Wages and Speculation.

§ 90. When persons adventure on a small scale so that the profits of their vocation are substantially their personal earnings, or when their personal earnings are mingled with other revenues, it is sometimes difficult to determine whether they should be allowed the benefit of the exemption laws. Some of the decisions lay down the rule that no exemption can be claimed unless the fund in question is purely the fruits of the personal labor of the defendant; and accordingly it was held that the money due a contractor for grading a street, who employed, to aid in the work, two carts, two or three horses, and hands enough, with himself, to keep these in exercise, was

³¹ Howell v. McDowell, 47 N. J. Law. 359, 1 Atl. 474; Moore v. Heaney, 14 Md. 558.

³² McSkimin v. Knowlton (Com. Pl.) 14 N. Y. Supp. 283.

³³ Sydnor v. City of Galveston (Tex. Civ. App.) 15 S. W. 202.

Wages cease to be current unless payment is demanded when due. Bell v. Indian Live-Stock Co. (Tex. Sup.) 11 S. W. 344.

³⁴ First Nat. Bank v. Graham, 3 Tex. Civ. App. 462, 22 S. W. 1101.

³⁵ Tatnum v. Zachry, 86 Ga. 573, 12 S. E. 940.

³⁶ Brierre v. His Creditors, 43 La. Ann. 423, 9 South. 640.

not exempt as wages of a laborer;³⁷ and that money due a boarding house keeper from her boarders is not personal earnings.³⁸ But, on the other hand, it has been held that such board money is earnings;³⁹ that money due a miner for coal mined at a fixed rate per ton, who hired a man to help him, is wages;⁴⁰ that money due a mason under contract whereby he built the foundation of a house, and furnished the material therefor, for a certain price, the owner, by agreement, advancing the money to buy such material as fast as necessary, is personal earnings;⁴¹ that fees due a flour inspector for flour inspected by him in the chamber of commerce, with the aid of a deputy, a laborer, and a bookkeeper, are his earnings;⁴² and the same was held of money due defendant for the labor of himself and his exempt team.⁴³

Laborers, Clerks, Mechanics, etc.

§ 91. A laborer is one who subsists by physical toil, in distinction from one who subsists by professional skill. Where physical toil is the main ingredient of services rendered, although directed and made more valuable by skill, the person performing them is a la-

³⁷ Heebner v. Chave, 5 Pa. St. 115. See, also, Smith v. Brooke, 49 Pa. St. 147; Henderson v. Nott, 36 Neb. 154, 54 N. W. 87.

³⁸ Shelly v. Smith, 59 Iowa, 453, 13 N. W. 419.

³⁹ Jenks v. Dyer, 102 Mass. 235; Somers v. Keliher, 115 Mass. 165; Jason v. Antone, 131 Mass. 534.

⁴⁰ Pennsylvania Coal Co. v. Costello, 33 Pa. St. 241.

⁴¹ Banks v. Rodenbach, 54 Iowa, 695, 7 N. W. 152; Millington v. Laurer, 89 Iowa, 322, 56 N. W. 533.

⁴² Brown v. Hebard, 20 Wis. 326, 91 Am. Dec. 408.

⁴³ Kuntz v. Kinney, 33 Wis. 510.

borer, within the meaning of these statutes.⁴⁴ Upon this principle it has been held that overseers,⁴⁵ oil gaugers,⁴⁶ shipping and receiving clerks,⁴⁷ forwarding clerks and bookkeepers,⁴⁸ clerks in a store,⁴⁹ stenographers,⁵⁰ and locomotive engineers⁵¹ are laborers, within the meaning of these statutes; and that railway presidents,⁵² bosses of departments in large factories,⁵³ commissioners in a suit for partition,⁵⁴ conductors of

⁴⁴ *Williams v. Link*, 64 Miss. 641, 1 South. 907; *Caraker v. Mathews*, 25 Ga. 571; *In re Ho King*, 14 Fed. 724; *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144; *Smith v. Brooke*, 49 Pa. St. 147.

LABORERS DEFINED: "The act was, doubtless, intended to protect and secure to the laborer what was earned by his own hands. 'Muzzle not the ox which treadeth out the corn.' It was not designed to protect the contracts of those who speculate upon or make profit out of the labor of others. The term 'labor,' to be sure, is of very extensive signification. The merchant labors, for there is mental as well as corporeal labor; the farmer labors; the professional man labors; the judges labor, as every member of this court can testify. But it is this very capability of enlarged extension which produces the necessity to circumscribe and limit the word as used in the statute, in order to accomplish what we believe must have been the intent of the legislature; that is, to secure to the manual laborer, by profession and occupation, the fruits of his own work for the subsistence of himself and family." *Heebner v. Chave*, 5 Pa. St. 115. To the same effect, see *Henderson v. Nott*, 36 Neb. 154, 54 N. W. 87.

⁴⁵ *Caraker v. Mathews*, 25 Ga. 571; *Russell v. Arnold*, Id. 623.

⁴⁶ *Hutchinson v. Gormley*, 48 Pa. St. 270.

⁴⁷ *Butler v. Clark*, 46 Ga. 466.

⁴⁸ *Claghorn v. Saussy*, 51 Ga. 576; *Smith v. Johnson*, 71 Ga. 748; *Lamar v. Chisholm*, 77 Ga. 306; *Cox v. Bearden*, 84 Ga. 304, 10 S. E. 627.

⁴⁹ *Williams v. Link*, 64 Miss. 641, 1 South. 907.

⁵⁰ *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778.

⁵¹ *Sanner v. Shivers*, 76 Ga. 335.

⁵² *South & N. A. Ry. Co. v. Falkner*, 49 Ala. 115.

⁵³ *Kile v. Montgomery*, 73 Ga. 343.

⁵⁴ *State v. Cobb*, 4 Lea (Tenn.) 481.

passenger trains,⁵⁵ commercial travelers,⁵⁶ and brokers⁵⁷ are not.

Exemption not Affected by Residence.

§ 92. It is apprehended that the sound rule as to what persons are entitled to the benefit of the exemption provisions of the garnishment statutes, so far as the residence of the exemptionist is concerned, is stated by the supreme court of Kansas, as follows: "No distinction is made by such sections between residents and nonresidents, or between debts created in Kansas and debts created elsewhere; and the weight of authority seems to be that where the statutes do not make any distinction, no such distinction exists; that if the statutes do not restrict the exemption of property for the payment of debts to residents, or in some other particular class of persons, the courts have no authority to make such restriction, and the statutes will apply to all classes, nonresidents as well as residents."⁵⁸

⁵⁵ *Miller v. Dugas*, 77 Ga. 386.

⁵⁶ *Briscoe v. Montgomery*, 93 Ga. 602, 20 S. E. 40; *Wilder v. Ferguson*, 42 Minn. 112, 43 N. W. 794. Contra, *William Deering & Co. v. Ruffner*, 32 Neb. 845, 49 N. W. 771.

⁵⁷ *Hamberger v. Marcus*, 157 Pa. St. 133, 27 Atl. 681.

⁵⁸ *Missouri Pac. Ry. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235, 238.

The following cases declare the same doctrine: *Bell v. Indian Live-Stock Co.* (Tex. Sup.) 11 S. W. 344; *Hewett v. Allen*, 54 Wis. 584, 12 N. W. 45; *Lowe v. Stringham*, 14 Wis. 222; *Wright v. Chicago, B. & Q. Ry. Co.*, 19 Neb. 175, 27 N. W. 90; *Kansas City, St. J. & C. B. Ry. Co. v. Gough*, 35 Kan. 1, 10 Pac. 89, 93; *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900; *Mineral Point Ry. Co. v. Barron*, 83 Ill. 365; *Wabash Ry. Co. v. Dougan*, 142 Ill. 248, 31 N. E. 594; *Chicago & A. Ry. Co. v. Ragland*, 84 Ill. 375. Com-

Limitation of the Right to Claim Exemption.

Courts Cannot Impose.

§ 93. The courts have no authority to make restrictions or limitations upon the exemption statutes other than those contained in the statutes themselves. The decisions cited in the last section are founded upon this principle. Likewise, the benefits of the statute may be claimed by all classes of persons, professional men as well as laborers, unless the statute excludes them by its own limitations.⁵⁹ For the same reason, unless the statute expressly limits the exemption of wages to a certain amount in a given time, the whole amount may be claimed every time the wages are garnished, no matter how often, regardless of any sums

pare *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645; *Hill v. Loomis*, 6 N. H. 263; *Sproul v. McCoy*, 26 Ohio St. 577.

EXEMPTION AFFECTED BY RESIDENCE: Such cases as *Yelverton v. Burton*, 26 Pa. St. 351, *Orr v. Box*, 22 Minn. 485, and *McHugh v. Curtis*, 48 Mich. 262, 12 N. W. 163, sometimes cited as supporting a contrary doctrine to the one just stated, have no tendency in that direction nor any bearing on the point. Shall all strangers within our borders be placed in the same category with absconding debtors, and presumptively rogues? The only case directly in point that has come to the knowledge of the writer holding or seeming to hold contrary to the rule stated in the text is *Hawkins v. Pearce*, 11 Humph. (Tenn.) 45, and that has been severely criticised.

Of course, where the statute expressly limits the exemption to residents it must be followed. *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172, 180; *Lyon v. Callopy*, 87 Iowa, 567, 54 N. W. 476; *Porter v. Navin*, 52 Ark. 352, 12 S. W. 705.

AN INTENTION TO REMOVE from the state does not affect the right to claim exempt wages. *Winslow v. Benedict*, 70 Ill. 120.

⁵⁹ *Brown v. Hebard*, 20 Wis. 326, 91 Am. Dec. 408; *McCoy v. Cornell*, 40 Iowa, 457; *Millington v. Laurer*, 89 Iowa, 322, 56 N. W. 533; *Miller v. Hooper*, 19 Hun (N. Y.) 394.

the defendant may earn, receive, or have due from any other employer, and regardless of any sums he may have received just before from the garnishee himself;⁶⁰ and, when the plaintiff prosecutes several successive garnishments against the same employer at the same time, the statutory exemption may be claimed in each.⁶¹ In some states the exemption of wages extends only to those earned within a certain time before.⁶² In such cases the time is reckoned from the date of service of the garnishment summons, and not from the date of its issue.⁶³

Exemption against Debts for Necessaries and Labor.

§ 94. Some and perhaps the majority of the states have statutes declaring that no property shall be exempt from execution or other final process upon any judgment for laborers' wages. These might seem to limit the clause of the garnishment statute exempting wages from garnishment, but it has been held under such laws that exempt wages cannot be attached to satisfy a judgment obtained for wages.⁶⁴ Some of the statutes provide that money due for wages shall

⁶⁰ Waite v. Franciola, 90 Tenn. 191, 16 S. W. 116; Chandler v. White, 71 Miss. 161, 14 South. 454; Hall v. Hartwell, 142 Mass. 447, 8 N. E. 333.

But, under some statutes, no exemption can be claimed without proof that it is necessary for the family support. Cushing v. Quigley, 11 Mont. 577, 29 Pac. 337.

⁶¹ Hall v. Hartwell, 142 Mass. 447, 8 N. E. 333; Haynes v. Thompson, 80 Me. 125, 13 Atl. 276.

⁶² Bloodgood v. Meissner, 84 Wis. 452, 456, 54 N. W. 772; Seligmann v. Heller Bros. Clothing Co., 69 Wis. 410, 414, 34 N. W. 232.

⁶³ Bean v. Germania Life Ins. Co., 54 Minn. 366, 56 N. W. 127.

⁶⁴ Snyder v. Brune, 22 Neb. 189, 34 N. W. 364; Frutchey v. Lutz, 167 Pa. St. 337, 31 Atl. 638; Baker v. Harding, 1 Wilcox (Pa.) 185. Contra, Enke v. Stine, 4 Kulp (Pa.) 56.

not be exempt from certain demands, such as necessities. Under such a statute, it was held that a suit on a judgment obtained for necessities is not a suit for necessities, as the old debt was merged in the judgment, and extinguished.⁶⁵ The word "necessaries" as here used means necessities for the family, and not provisions furnished for a boarding house kept by the householder.⁶⁶ In order to avoid the exemption, the demand sued must be wholly of the class against which exemption is not allowed.⁶⁷

Exempt Property cannot be Impounded by Garnishment.

§ 95. It has been held that exempt property in the hands of the garnishee at the time the writ of garnishment is served on him is not tied up by the garnishment, and that it is as much the duty of the custodian to deliver it to the owner when demanded as if no garnishment had been served on him, and that the owner may sue for and recover the same while the garnishment suit is pending;⁶⁸ and the same is true of ex-

⁶⁵ *Brown v. West*, 73 Me. 23.

⁶⁶ *Lenhoff v. Fisher*, 32 Neb. 107, 48 N. W. 821.

⁶⁷ *Freem. Ex'ns*, § 217, and cases there cited. But see *Pullen v. Monk*, 82 Me. 412, 19 Atl. 909.

⁶⁸ *Hanselman v. Kegel*, 60 Mich. 540, 543, 27 N. W. 678; *Traders' Ins. Co. v. Chase* (Tex. Civ. App.) 31 S. W. 1103; *Ross v. Bourne*, 14 Fed. 858, 17 Fed. 703; *McCarty v. The City of New Bedford*, 4 Fed. 818.

DAMAGES FOR WRONGFUL DETENTION: When it appears that the garnishee delivered the garnished property to the defendant within a reasonable time after receiving notice that it is exempt, the defendant cannot recover damages of him for a wrongful detention of the goods. *Hynds v. Wynn*, 71 Iowa, 593, 31 N. W. 73.

empt wages.⁶⁹ But this rule could be applied only in a clear case, for, if there were any doubt as to whether the property or wages were exempt in the garnishment suit, the garnishee would have a right to protect himself against a double liability.⁷⁰

Voluntary Sale of Exempt Property.

Property not Garnishable because of Sale.

§ 96. Property or credits do not cease to be exempt by reason of an offer or attempt by the defendant to sell them, nor by an actual transfer; and his creditors cannot question the validity of such a sale. What is absolutely exempt he may deal with as he chooses. He may sell it, destroy it, or give it away. He can commit no fraud upon creditors by dealings with property towards which their eyes can never be turned.⁷¹

⁶⁹ *Sullivan v. Hadley Co.*, 160 Mass. 32, 35 N. E. 103; *Ross v. Bourne*, 14 Fed. 958, 17 Fed. 703; *McCarty v. Steam Propeller City of New Bedford*, 4 Fed. 818; *The City of New Bedford*, 20 Fed. 57; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 651, 57 N. W. 1050; *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521; *Davis v. Humphrey*, 22 Iowa, 137; *Emmons v. Southern Bell Tel. Co.*, 80 Ga. 760, 7 S. E. 232.

⁷⁰ *Ulrich v. Hower*, 156 Pa. St. 414, 27 Atl. 243.

⁷¹ *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388, 393; *Anderson v. Odell*, 51 Mich. 492, 16 N. W. 870; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139; *Millington v. Laurer*, 89 Iowa, 322, 56 N. W. 533; *Farmer v. Turner*, 64 Iowa, 690, 21 N. W. 140; *Brainard v. Simmons*, 67 Iowa, 646, 25 N. W. 844; *Buckley v. Wheeler*, 52 Mich. 1, 17 N. W. 216; *Marshall v. State*, 107 Ind. 173, 6 N. E. 142; *Abbott v. Smith*, 64 N. H. 615, 10 Atl. 817.

GIFTS OF LABOR AND WAGES: A laborer having given a part of his exempt earnings to his wife each month, she deposited the same in the bank in her own name, and afterwards the bank was summoned as garnishee of the husband, and the court held that it

It is difficult to understand how a creditor can first become entitled to reach his debtor's property the moment it ceases to be his property.⁷²

Proceeds may be Garnishable.

§ 97. But, when exempt property is voluntarily disposed of for other property not so exempt, the property or money received in the exchange is liable to the claims of creditors by execution or garnishment,⁷³ unless the sale was made pursuant to a previous design to purchase other property to take the place of that sold, which intention must be proved, and will not be presumed.⁷⁴ Upon this principle, it has been held that proceeds of a homestead sold for the purpose of buying another therewith are exempt from garnishment.⁷⁵ The length of time intervening since the sale

was liable for the money so deposited, saying: "It is argued that they were exempt when given to the wife, and consequently always remain so. If this be good law, a very easy way has been discovered by which a debtor may in a few years accumulate a competence in the hands of his wife, and snap his fingers at importunate creditors. We cannot subscribe to such a view." *Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772. See, also, *Spelman v. Aldrich*, 126 Mass. 113; *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189.

"All of a debtor's tangible property, save what may be exempt from execution, is liable to be seized in satisfaction of his debts. His labor is not equally available to the creditor for the purposes of satisfaction. He may sell it, or give it away, or dispose of it in such manner as he pleases; and, if the transaction infringes no established legal principle, the creditor is remediless." *Denver, T. & Ft. W. Ry. Co. v. Smeeton*, 2 Colo. App. 126, 29 Pac. 815.

⁷² *Anderson v. Odell*, 51 Mich. 492, 16 N. W. 870.

⁷³ *Harrier v. Fassett*, 56 Iowa, 264, 9 N. W. 217; *Scott v. Brigham*, 27 Vt. 561; *Knabb v. Drake*, 23 Pa. St. 489, 62 Am. Dec. 352; *Mour-sund v. Priess*, 84 Tex. 554, 19 S. W. 775.

⁷⁴ *Huskins v. Hanlon*, 72 Iowa, 37, 33 N. W. 352.

⁷⁵ *Watkins v. Blatschinski*, 40 Wis. 347; *State v. Geddis*, 44 Iowa, 537; *Skinner v. Chadwell* (Ky.) 1 S. W. 437. Compare *Mitchell v.*

of the old homestead is not essentially a controlling circumstance in determining the intent to buy a new one.⁷⁶

Proceeds of Exempt Property Destroyed or Converted without Owner's Consent.

§ 98. When exempt property is converted into money, a right of action, or other property, by an event over which the owner has no control or by a proceeding wholly in invitum, that into which it is converted is also exempt, whether it would otherwise be so or not. Upon this principle, it has been held that money due under an insurance policy upon exempt property destroyed by fire,⁷⁷ the assessed damages for condemn-

Milhoan, 11 Kan. 618. Contra, Mann v. Kelsey, 71 Tex. 609, 12 S. W. 43; Executor of Doane v. Doane, 46 Vt. 485; Moursund v. Priess, 84 Tex. 554, 19 S. W. 775.

STATUTES ALLOWING SALE AND EXCHANGE OF EXEMPT HOMESTEAD: The Minnesota homestead statute forbids the parties allowed the same to sell it, to wit: "Provided they shall not have the right to sell or convey the said homestead." Gen. St. 1894, § 5521. The Wisconsin statute contains a much different provision (Sanb. & B. Ann. St. § 2983): "A homestead consisting, (etc.,) * * * shall be exempt from seizure or sale, (etc.,) * * * and such exemption shall not be impaired by * * *, nor by a sale thereof, but shall extend to the proceeds derived from such sale while held with the intention to procure another homestead therewith for a period not exceeding two years." Use for other purposes of part of the proceeds of homestead and other property sold for a lump sum does not impair the exemption. Binzel v. Gorgan, 67 Wis. 147, 29 N. W. 895. There need have been no intention to buy another homestead within the state, nor a residence within the state during the two years. Hewett v. Allen, 54 Wis. 583, 12 N. W. 45. Securities taken as payment for the homestead are exempt as proceeds. Bailey v. Steve, 70 Wis. 316, 35 N. W. 735.

⁷⁶ State v. Geddis, 44 Iowa, 537, 539.

⁷⁷ Houghton v. Lee, 50 Cal. 101; Bernheim v. Davitt (Ky.) 5 S. W.

ing a right of way over a homestead,⁷⁸ a judgment recovered in an action in tort for injuries to exempt property, either negligent or willful,⁷⁹ or for wrongfully attaching and selling the same,⁸⁰ the surplus due the defendant after satisfaction on foreclosure sale of a mortgage given by him thereon,⁸¹ and the amount required by statute to be given the debtor in cash on the sale under execution of exempt property exceeding in value the amount exempted by law,⁸² are all exempt from garnishment.

193; *Cameron v. Fay*, 55 Tex. 62; *Reynolds v. Haines*, 83 Iowa, 342, 49 N. W. 851; *Puget Sound Dressed Beef & Packing Co. v. Jeffs* (Wash.) 39 Pac. 962; *Ward v. Goggan*, 4 Tex. Civ. App. 274, 23 S. W. 479; *Jones v. Whiteselle* (Tex. Civ. App.) 29 S. W. 177; *Cooney v. Cooney*, 65 Barb. (N. Y.) 525. CONTRA, *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128; *Smith v. Ratcliff*, 66 Miss. 683, 6 South. 460.

PROOF THAT PROPERTY WAS EXEMPT: The defendant must prove that the property destroyed was exempt. *Dounnelly v. O'Connor*, 22 Minn. 309; *Fletcher v. Staples* (Minn.) 64 N. W. 1150; *Winsor v. McLachlan* (Wash.) 40 Pac. 727.

Insurance money to the extent of \$60,000 will not be held all exempt. *Swayne v. Chase* (Tex. Civ. App.) 29 S. W. 418.

⁷⁸ *Kaiser v. Seaton*, 62 Iowa, 463, 17 N. W. 664.

⁷⁹ *Mudge v. Lanning*, 68 Iowa, 641, 27 N. W. 793; *Crawford v. Carroll*, 93 Tenn. 661, 27 S. W. 1010; *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805.

⁸⁰ *Below v. Robbins*, 76 Wis. 600, 45 N. W. 416; *Stebbins v. Peeler*, 29 Vt. 289; *Tillotson v. Wolcott*, 48 N. Y. 189; *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163; *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578.

A judgment recovered for the amount of exempt wages appropriated by garnishment in another state is exempt. *Steele v. McKerrihan* (Pa. St.) 33 Atl. 570.

⁸¹ *Brainard v. Simmons*, 67 Iowa, 646, 25 N. W. 844.

⁸² *Gery v. Ehrgood*, 31 Pa. St. 329; *Keyes v. Rines*, 37 Vt. 260. 86 Am. Dec. 707; *White v. Fulghum*, 87 Tenn. 281, 10 S. W. 501; *Cameron v. Fay*, 55 Tex. 58, 63; *Jones v. Whiteselle* (Tex. Civ. App.) 29 S. W. 177.

COMPUTATION OF TIME: Under a statute making \$1,000 thus
(132)

Personal Earnings and Pension Money Exempt after Payment.

§ 99. Some of the courts hold that these statutes have performed their office when they have enabled the laborer or pensioner to get his wages or pension money into his own possession without let or hindrance. Under this interpretation, it has been held that pension money deposited in a bank by the defendant may be garnished,⁸³ and that land purchased with it is not exempt from execution.⁸⁴ Other courts hold that the statutes do not mean that the exemptionist shall be entitled to the enjoyment of his exempt money before he receives it, but not afterwards, and, therefore, that the same is exempt so long as it can be iden-

exempt for one year, *held*, that the time consumed in testing the validity of the sale is no part of the year. *Walsh v. Horine*, 36 Ill 238.

⁸³ *Webb v. Holt*, 57 Iowa, 712, 11 N. W. 658; *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408; *Spelman v. Aldrich*, 126 Mass. 113; *Rozelle v. Rhodes*, 116 Pa. St. 129, 9 Atl. 160; *Jardain v. Fairton Sav. Fund & Bldg. Ass'n*, 44 N. J. Law, 376; *Manchester v. Burns*, 45 N. H. 482; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739. CONTRA, *Crow v. Brown*, 81 Iowa, 344, 46 N. W. 993.

⁸⁴ *McFarland v. Fish*, 34 W. Va. 548, 12 S. E. 548; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878. Contra, *Crow v. Brown*, 81 Iowa, 344, 46 N. W. 993.

DEED IN NAME OF WIFE: But if the pension check was used to buy land, and the deed for the same taken in the wife's name, the husband's creditors cannot have the deed set aside or reach the land on execution, for then the pension was exempt, and the owner could give it away. *Farmer v. Turner*, 64 Iowa, 690, 21 N. W. 140; *Faurote v. Carr*, 108 Ind. 123, 9 N. E. 350.

CROPS raised on such land are not exempt unless it is a homestead. *Haefer v. Mullison*, 90 Iowa, 372, 57 N. W. 893.

tified, whether in the bank or elsewhere.⁸⁵ But, whichever view is correct, it is generally admitted that the exemption does not expire till the money has been actually reduced to the personal possession of the exemptionist.⁸⁶

Exemption Laws Have No Force Out of the State.

§ 100. Exemption statutes have no extraterritorial force. Therefore, the fact that the money or property garnished would be exempt from garnishment in the state where the owner lives, or where it was intended to be paid or delivered, but for the garnishment proceedings, is no defense to the garnishment suit, and will not discharge the garnishee; the law of the forum governs.⁸⁷

⁸⁵ *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Elliot v. Hall*, 2 Idaho, 1142, 31 Pac. 796; *Folschow v. Werner*, 51 Wis. 85, 7 N. W. 911; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550, 23 N. E. 1108; *Hayward v. Clark*, 50 Vt. 612; *Eckert v. McKee*, 9 Bush (Ky.) 355; *Crow v. Brown*, 81 Iowa, 344, 46 N. W. 993.

⁸⁶ *Cox v. Bearden*, 84 Ga. 304, 10 S. E. 627; *Payne v. Gibson*, 5 Lea (Tenn.) 173; *Eckert v. McKee*, 9 Bush (Ky.) 355; *Hayward v. Clark*, 50 Vt. 612; *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408; *Webb v. Holt*, 57 Iowa, 712, 11 N. W. 658. Contra. *Cook v. Holbrook*, 6 Allen, 572.

⁸⁷ *First Nat. Bank v. Burch*, 80 Mich. 242, 246, 45 N. W. 93; *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. 70; *Leiber v. Union Pac. Ry. Co.*, 49 Iowa, 688; *Mooney v. Union Pac. R. Co.*, 60 Iowa, 346, 14 N. W. 343; *Lyon v. Callopy*, 87 Iowa, 567, 54 N. W. 476; *Broadstreet v. Clark*, 65 Iowa, 670, 22 N. W. 919; *East Tennessee, V. & G. Ry. Co. v. Kennedy*, 83 Ala. 462, 3 South. 852; *Burlington & M. R. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622; *Wabash Ry. Co. v. Dougan*, 142 Ill. 248, 31 N. E. 596; *Missouri Pac. Ry. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235; *Morgan v. Neville*, 74 Pa. St. 52; *Carson v. Memphis & C. Ry. Co.*, 88 Tenn. 646, 13 S. W. 588;

Limitation of Rule.

§ 101. The rule just stated applies in all cases where citizens and residents of any state bring suits in the court of that state, and in favor of persons who are not residents of the state, nor residents of the same state with the defendant; but where all the parties are residents of the same foreign state, or where the real plaintiff, though not the nominal plaintiff, is a resident of the same state with the defendant, and it appears that the action was brought for the purpose of avoiding the exemption laws of the state of their domicile, the exemption laws of the foreign state will be recognized and enforced; for, although exemption statutes have no force outside of the state where enacted, yet the courts of one state will not assist the citizens of another state in avoiding the law of their domicile, but will rather lend their aid in making the laws of their sister states effectual so far as may be in the states where enacted.⁸⁸

Eichelburger v. Pittsburg, C. & St. L. Ry. Co., 9 Am. & Eng. Ry. Cas. 158; *Roche v. Rhode Island Ins. Ass'n*, 2 Ill. App. 360.

Held, that the law of the place where the property is governs in determining the exemption. *Mason v. Beebee*, 44 Fed. 556.

⁸⁸ *Turner v. Sioux City & P. Ry. Co.*, 19 Neb. 241, 27 N. W. 103; *Mason v. Beebee*, 44 Fed. 556; *Wright v. Chicago, B. & Q. Ry. Co.*, 19 Neb. 175, 27 N. W. 90; *Missouri Pac. Ry. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235; *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. 70; *Martin v. Central Vermont Ry. Co.*, 3 N. Y. Supp. 82, 50 Hun, 347; *Kestler v. Kern*, 2 Ind. App. 488, 28 N. E. 726.

CONTRA: The supreme courts of some of the states have held that though the action is brought in those states by residents of another state, for the very purpose of avoiding the exemption laws of the state where both plaintiff and defendant reside, yet the *lex fori* will be applied; and thus the court of one state will be made the instrument by means of which the citizen of another state is enabled to shove by the law of his domicile, and set it at defiance. *Mooney*

Remedy of Persons Defrauded of Their Exemption.*May Recover from Creditor.*

§ 102. If a judgment creditor, directly or indirectly,—no matter where or by what process,—appropriates to the payment of a debt due him the exempt wages of his debtor without such debtor's consent, such creditor is liable to the debtor entitled to such exemption to the full amount of the misappropriation. This principle has been declared in the cases in which the debtor has been deprived of his exemption by garnishment proceedings instituted in another state for that purpose.⁸⁹

v. Union Pac. Ry. Co., 60 Iowa, 346, 14 N. W. 343; Broadstreet v. Clark, 65 Iowa, 670, 22 N. W. 919; Leonard v. Lawrence, 32 N. J. Law, 355; Stevens v. Brown, 20 W. Va. 450; Wabash Ry. Co. v. Dougan, 142 Ill. 248, 31 N. E. 596.

The decisions first above mentioned are criticised at length in Atchison, T. & S. F. Ry. Co. v. Maggard (Colo. App.) 39 Pac. 985.

⁸⁹ Albrecht v. Treitschke, 17 Neb. 205, 22 N. W. 418; Schaller v. Kurtz, 25 Neb. 655, 41 N. W. 642; O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867; Stark v. Bare, 39 Kan. 100, 17 Pac. 826; Kestler v. Kern, 2 Ind. App. 488, 28 N. E. 726; Stewart v. Thomson (Ky.) 31 S. W. 133. Compare Embree v. Hanna, 5 Johns. (N. Y.) 101, 103. Contra, Uppinghouse v. Mundel, 103 Ind. 238, 2 N. E. 719; Harwell v. Sharp, 85 Ga. 124, 11 S. E. 561. Compare Lawrence v. Batcheller, 131 Mass. 504.

STATUTE CONSTITUTIONAL: A recent Nebraska statute provides that it shall be unlawful for any one to assign any cause of action for the purpose of having it collected in any other state, in violation of the exemption laws of the state, or to bring suit himself in any other state for the same purpose, and makes the fact of garnishment in another state of the exempt wages of the defendant prima facie evidence of intent to avoid the exemption laws. This statute is constitutional. Singer Manuf'g Co. v. Fleming, 39 Neb. 679, 58 N. W. 226; Bishop v. Middleton, 43 Neb. 10, 61 N. W. 129. A like decision was

May Enjoin Threatened Wrong.

§ 103. And the courts of equity of the state where the parties reside will, by injunction, restrain the prosecution in another state of any suit brought there for the purpose of avoiding the exemption laws of the state where the parties both reside.⁹⁰ And the court granting the injunction will decree the return of whatever property has been taken by the defendant by such garnishment proceedings.⁹¹ But a citizen prosecuting an action in the courts of his own state to recover a debt due from a nonresident cannot, when temporarily found in the state where the debtor resides, be enjoined from taking by garnishment a debt exempt in the state where the debtor resides.⁹²

made on a similar statute in Pennsylvania. *Sweeney v. Hunter*, 145 Pa. St. 363, 22 Atl. 653.

Other statutes make it a criminal offense. *State v. Dittmar*, 120 Ind. 54, 388, 22 N. E. 88, 299.

⁹⁰ *Teager v. Landsley*, 69 Iowa, 725, 27 N. W. 739; *Hager v. Adams*, 70 Iowa, 746, 30 N. W. 36; *Mumper v. Wilson*, 72 Iowa, 163, 33 N. W. 449; *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747, 749; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269; *Snook v. Snetzer*, 25 Ohio St. 516; *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616; *Griggs v. Docter*, 89 Wis. 161, 61 N. W. 761; *Moton v. Hull*, 77 Tex. 80, 13 S. W. 849; *Harwell v. Sharp*, 85 Ga. 124, 11 S. E. 561; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Dehon v. Foster*, 4 Allen, 545; *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573; *Wabash W. Ry. Co. v. Seifert*, 41 Mo. App. 35; *McIntosh v. Ogilvie*, 4 Term. R. 193; *Story*, Eq. Jur. § 899; Editorial in 23 Cent. Law J. 268.

⁹¹ *Griggs v. Docter*, 89 Wis. 161, 61 N. W. 761.

⁹² *Griffith v. Langdale*, 53 Ark. 71, 13 S. W. 733.

Suits in Different States—Double Liability of Garnishee.

Garnishment in Another State a Defense.

§ 104. Inasmuch as exemption clauses in garnishment laws have no operation except in the state which enacted them, debtors and custodians, especially corporations existing and doing business in several states at the same time, are constantly liable to be summoned and charged as garnishees in respect to property in their possession, or debts owed by them which would be exempt from garnishment in the state where the owner of the property or the creditor of the garnishee resides, but which are not exempt in the state where the garnishment suit is brought. In such cases, persons or corporations summoned as garnishees in a suit against a nonresident defendant, and afterwards sued by such defendant in the jurisdiction of his domicile or elsewhere, may set up as a defense to such suit the fact that they have been summoned as garnishees for the demand, and that the suit is still pending against them as such in the foreign jurisdiction,⁹³ or that they have there been compelled to pay the same on a judgment against them as garnishees.⁹⁴

⁹³ *Baltimore & O. Ry. Co. v. May*, 25 Ohio St. 347; *Connor v. Hanover Ins. Co.*, 28 Fed. 549; *Lynch v. Hartford Fire Ins. Co.*, 17 Fed. 627; *Embree v. Hanna*, 5 Johns. (N. Y.) 101. CONTRA, *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461; *Traders' Ins. Co. v. Chase* (Tex. Civ. App.) 31 S. W. 1103; *McCarty v. The City of New Bedford*, 4 Fed. 818, 831; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430.

But see the very able dissenting opinion of Horton, C. J., in the last case cited.

⁹⁴ *Chicago, B. & Q. Ry. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475;

Whether Ground for Continuance or Plea in Bar.

§ 105. If the garnishment suit is still pending, such plea will operate as a stay of the proceedings till it is determined; and if judgment has been rendered against the garnishee, and paid, it will operate as an absolute defense pro tanto.⁹⁵

Pleading Exemption in Other State.

§ 106. Provided the garnishee has properly notified his creditor of the commencement of such garnishment proceedings, and brought to the attention of the court therein all the facts which he is allowed to urge as a defense in favor of the defendant, or which would be of any avail,⁹⁶ and if it appears that the offer of any particular defense would have been of no avail, the failure to make it is of no importance.⁹⁷

Extent and Reason of Protection.

§ 107. This rule will be applied although it appears that the garnishment suit in the foreign court

Morgan v. Neville, 74 Pa. St. 52; Moore v. Chicago, R. I. & P. Ry. Co., 43 Iowa, 385; The City of New Bedford, 20 Fed. 57; Telles v. Lynde, 47 Fed. 912; Carson v. Memphis & C. Ry. Co., 88 Tenn. 646, 13 South. 588; East Tennessee, V. & G. Ry. Co. v. Kennedy, 83 Ala. 462, 3 South. 852; Eichelburger v. Pittsburg, C. & St. L. Ry. Co., 9 Am. & Eng. Ry. Cas. 158.

⁹⁵ See post, §§ 199, 202.

⁹⁶ Pierce v. Chicago & N. W. Ry. Co., 36 Wis. 283; Terre Haute & I. Ry. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

⁹⁷ Chicago, B. & Q. Ry. Co. v. Moore, 31 Neb. 629, 48 N. W. 475; Carson v. Memphis & C. Ry. Co., 88 Tenn. 646, 13 S. W. 588; Moore v. Chicago, R. I. & P. Ry. Co., 43 Iowa, 387; East Tennessee, V. & G. Ry. Co. v. Kennedy, 83 Ala. 462, 3 South. 852; Eichelburger v. Pittsburg, C. & St. L. Ry. Co., 9 Am. & Eng. Ry. Cas. 158; and dissenting opinion of Horton, C. J., in Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375, 23 Pac. 434.

was prosecuted by a resident of the state where the last action was brought, and for the sole purpose of avoiding the exemption laws, for the reason that full faith and credit must be given to judgments of sister states;⁹⁸ and an honest debtor should not be required to pay his debt twice when he is not in fault.⁹⁹ On the other hand, the court entertaining the garnishment suit will discharge the garnishee upon his proving that after he was served the principal defendant commenced an action against him in another jurisdiction, and recovered final judgment against him in such suit, in the face of a full defense founded upon such garnishment proceedings. The discharge of the garnishee in such cases is not because the court entertaining the garnishment proceedings recognizes the judgment of the foreign court as correct, but because a tribunal having jurisdiction of the parties, and therefore power to compel obedience to its decisions, has passed judgment against the garnishee, without his fault, and has compelled, or will compel, payment of it.¹⁰⁰

⁹⁸ Const. U. S. art. 4, § 1.

⁹⁹ *Baltimore & O. Ry. Co. v. May*, 25 Ohio St. 347; *Morgan v. Neville*, 74 Pa. St. 52; *Chicago, B. & Q. Ry. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475; *Compare Baylies v. Houghton*, 15 Vt. 626, 630; *Eddy v. O'Hara*, 132 Mass. 56. Contra, *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461; *Central Vermont Ry. Co. v. Martin*, 50 Hun, 347, 3 N. Y. Supp. 82.

¹⁰⁰ *Eddy v. O'Hara*, 132 Mass. 56, involved this question only, and the opinion written by Chief Justice Gray declares the doctrine above stated. See, also, *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 597.

In a recent case a railroad company summoned as garnishee in Iowa, and sought to be charged for wages earned and payable in Kansas, set up as a defense that the wages were exempt to the defendant in Kansas, where he resided, and that after the garnishment was instituted he had sued the garnishee therefor in a Kan-

sas court, which, following a former decision of the supreme court of that state, rendered judgment in favor of the plaintiff therein, notwithstanding a full defense founded on the garnishment proceedings; that the garnishee had appealed from such judgment; and that the appeal was still pending. The Iowa court refused to recognize the proceedings in the Kansas court, and affirmed the judgment of the lower court charging the garnishee. *Willard v. Sturm* (Iowa) 65 N. W. 847. The court did not refer to the decisions above cited, but held the proceedings in Kansas void because the suit in Iowa was first instituted.

CHAPTER V.

DEBTS AND PROPERTY WHICH ARE SUBJECT TO GARNISHMENT.

- § 108. Corporate Stock—Not Liable to Creditors except by Statute.
- 109. — Of Foreign Corporations.
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- 112. Stockholders' Liability for Unpaid Installments—After Call.
- 113. — Before Call.
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Corporate Stock.

Not Liable to Creditors except by Statute.

§ 108. At common law, shares of stock in corporations were not subject either to execution or attachment,¹ but are made subject to both by statute in most of the states. It is held that these statutes must be substantially complied with, or the proceedings will be void.²

Of Foreign Corporations.

§ 109. Under these statutes, stock cannot be attached unless the corporation is incorporated in the state where the suit is brought, though it has its principal office there.³

¹ Drake, Attachm. § 244; Freem. Ex'ns, § 262a; 23 Am. & Eng. Enc. Law, 622.

² Morton v. Grafflin, 68 Md. 545, 13 Atl. 341; Blair v. Compton, 33 Mich. 413, 425; Howe v. Starkweather, 17 Mass. 240.

³ Plimpton v. Bigelow, 93 N. Y. 592; Armour Bros. Banking Co.

Unrecorded Transfer.

§ 110. Where it is provided by statute, as it is in most of the states, that transfers of stock shall be made on the books of the company, an attachment of the stock in a suit against the person in whose name the stock stands on these books will prevail over a previous unrecorded transfer by him to another for a valuable consideration.⁴ And, on the other hand, the equitable interest of one to whom the stock has been sold, but who has not yet caused the transfer to be recorded, may be attached;⁵ and so may the interest of one who has caused a transfer of his stocks to another

v. St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690; Ireland v. Globe Milling & Reduction Co. (R. I.) 32 Atl. 921; Morton v. Grafflin, 68 Md. 545, 13 Atl. 341; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250; Smith v. Downey, 8 Ind. App. 179, 34 N. E. 823, and 35 N. E. 568. CONTRA, Young v. South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202; Puget Sound Nat. Bank v. Mather (Minn.) 62 N. W. 396.

"The attachment process is a proceeding in rem, and the matter and thing attached must be in the power and jurisdiction of the court. You might as well, by an ideal and constructive service on the person of the defendant resident in Mississippi, summon him to appear in our court, as to attach him to compel an appearance by attaching his bank stock in a bank located and established by law in Mississippi." Christmas v. Biddle, 13 Pa. St. 223.

⁴ Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 32 N. W. 336; Fisher v. President, etc., of Essex Bank, 5 Gray, 373; Skowhegan Bank v. Cutler, 49 Me. 315; Sabin v. Bank of Woodstock, 21 Vt. 353; Cheever v. Meyer, 52 Vt. 66; People's Bank v. Gridley, 91 Ill. 457; Northrop v. Newtown & B. Turnpike Co., 3 Conn. 544; Application of Murphy, 51 Wis. 519, 8 N. W. 419; State Ins. Co. v. Sax, 2 Tenn. Ch. 507. CONTRA, Broadway Bank v. McElrath, 13 N. J. Eq. 24; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Black v. Zacharie, 3 How. 483.

⁵ Middletown Sav. Bank v. Jarvis, 33 Conn. 372; Foster v. Potter, 37 Mo. 525. CONTRA, Lippitt v. American Wood-Paper Co., 15 R. I. 141, 23 Atl. 111.

to be entered upon the books of the company for the purpose of defrauding his creditors, while he retains the real ownership.⁶

Garnishable by Special Statute.

§ 111. Some of the garnishment statutes expressly declare that, when the garnishee is a corporation, it shall answer for any stock therein held by or for the benefit of the defendant;⁷ and under these the interest of the defendant may be reached, though he has caused the certificates to be issued in the name of a third person.⁸ There are decisions which seem to sustain judgments against corporations as garnishees by reason of the stock in them owned by the defendant without such statutes,⁹ but the weight of authority is against such a holding.¹⁰ As to the right to charge

⁶ *Beckwith v. Burrough*, 14 R. I. 366, 51 Am. Rep. 392; *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221; *Curtis v. Steever*, 36 N. J. Law, 304.

⁷ *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113; *Waco State Bank v. Stephenson Manuf'g Co.*, 4 Tex. Civ. App. 137, 23 S. W. 234.

Held that, to obtain a valid lien, the statutory course must be pursued. *Mooar v. Walker*, 46 Iowa, 164; *Younkin v. Collier*, 47 Fed. 571.

⁸ *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

⁹ *Atwood v. Dumas*, 149 Mass. 167, 21 N. E. 236; *Chesapeake Ry. Co. v. Paine*, 29 Grat. (Va.) 502; *Shenandoah Val. Ry. Co. v. Griffith*, 76 Va. 913, 13 Am. & Eng. Ry. Cas. 120.

¹⁰ *Planters' & Merchants' Bank v. Leavens*, 4 Ala. 753; *Ross v. Ross*, 25 Ga. 297; *Nashville Bank v. Ragsdale*, Peck (Tenn.) 296; *Plimpton v. Bigelow*, 93 N. Y. 592; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 20 S. W. 690; *Netter v. Chicago Board of Trade*, 12 Ill. App. 607.

A summons issued to a person who is secretary of the corporation

the garnishee for certificates of stock in his possession belonging to the defendant, see "Choses in Action."¹¹

Stockholders' Liability for Unpaid Installments.

After Call.

§ 112. When a subscriber for stock in a corporation is in default for installments for which calls have been made, he stands in the same attitude as any other debtor of the corporation, and may be charged as garnishee therefor in suits against it.¹² For this purpose it is not essential that the call be made by the directors or other officers of the company; a call properly made by an officer appointed by the court for that purpose is sufficient.¹³

Before Call.

§ 113. Some of the courts hold that unpaid installments of stock, for which the company could not sue because no call has been made therefor, cannot be reached by garnishment in suits against it, for the reason that the plaintiff occupies against the garnishee

would not attach the stock in the company owned by the defendant, for it is not a garnishment of the company, though he so understood it. *Moor v. Walker*, 46 Iowa, 164.

¹¹ Post, §§ 163-168.

¹² *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571; *Faull v. Alaska Gold & Silver Min. Co.*, 14 Fed. 657, 8 Sawy. 420; *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 South. 496; *Joseph v. Davis* (Ala.) 10 South. 830; *Dean v. Biggs*, 25 Hun (N. Y.) 122; *Meints v. East St. Louis Co-op. Rail Mill Co.*, 89 Ill. 48.

The property of a corporation in the hands of one of its stockholders may be reached by garnishment against him. *Hughes v. Oregonian Ry. Co.*, 11 Or. 158, 2 Pac. 94.

¹³ *Hays v. Lycoming Fire Ins. Co.*, 99 Pa. St. 621.

the position of the defendant, and acquires his rights only.¹⁴

Call not Necessary.

§ 114. Other courts recognize the general exception to the rule just stated that the absence of a demand without which the defendant could not sue the garnishee is no defense to the garnishment,¹⁵ observing that the obligation of the stockholder arises out of the act of subscribing, and continues from that time, and not from the call.¹⁶

Obligations not Payable in Money.

When Garnishable.

§ 115. Besides property belonging to the defendant, and "debts," properly so called, due him, being demands payable in money, many of the statutes, either by express enumeration or by reason of the broad

¹⁴ Bingham v. Rushing, 5 Ala. 403; Teague v. Le Grand, 85 Ala. 493, 5 South. 287; Brown v. Union Ins. Co., 3 La. Ann. 177; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. 386; Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 Pac. 890; Seymour v. Sturgess, 26 N. Y. 134.

Stockholders who have received fully-paid stock for property at a fictitious valuation cannot be charged as garnishees for the difference between the real and fictitious values. The creditor's remedy is in equity. Nicrosi v. Irvine, 102 Ala. 648, 15 South. 429.

¹⁵ See ante, § 46.

¹⁶ In re Glenn Iron Works, 17 Fed. 324; Scott v. Windham (Miss.) 16 South. 206. Compare Peterson v. Sinclair, 83 Pa. St. 250; Langford v. Ottumwa Water-Power Co., 59 Iowa, 283, 13 N. W. 303.

This is so by statute in Illinois (Hurd's St. 1891, c. 32, § 8). Coalfields Co. v. Peck, 98 Ill. 139.

A stipulation in the contract of subscription that it shall be payable only on the call of the company cannot be permitted to defeat the rights of creditors. Curry v. Woodward, 53 Ala. 371.

general terms employed in them, render the garnishee chargeable for certain obligations not payable in money.¹⁷

Nature of Judgment upon.

§ 116. From the general principle that the garnishee cannot be deprived of any right to which he is entitled against the defendant, it follows that he cannot be held to pay in any other mode, or upon any other terms or conditions, than those provided in the contract under which he is bound to the defendant; and therefore no absolute money judgment can be rendered against him in any such cases, but he must have an opportunity to pay according to his contract, upon failure to do which he may be compelled to pay as on a money demand.¹⁸

Not Garnishable as "Debt."

§ 117. It has been held that, when a garnishee is bound to perform work and labor for the defendant, the obligation is a credit for which he may be charged;¹⁹ but the term "credit" is generally understood

¹⁷ Rice v. Talmadge, 20 Vt. 378; Bartlett v. Wood, 32 Vt. 372; National Union Bank v. Brainerd, 65 Vt. 291, 26 Atl. 723; Comstock v. Farnum, 2 Mass. 96; Clark v. King, Id. 524; Clark v. Brewer, 6 Gray, 320.

¹⁸ Stadler v. Parmlee, 14 Iowa, 175; Ransom v. Stanberry, 22 Iowa, 334; Smith v. Davis, 1 Wis. 447, 60 Am. Dec. 390; Rasmussen v. McCabe, 43 Wis. 471; Cherry v. Hooper, 7 Jones (N. C.) 82; Bartlett v. Wood, 32 Vt. 372; Union Nat. Bank v. Brainerd, 65 Vt. 291, 26 Atl. 723; Marshall v. Grand Gulf Railway & Banking Co., 5 La. Ann. 360; Fuller v. O'Brien, 121 Mass. 422; Blackburn v. Davidson, 7 B. Mon. (Ky.) 101; Jennings v. Summers, 8 Miss. 453; Boyd v. Brown, 120 Ind. 393, 22 N. E. 249; Dickinson v. Dickinson, 59 Vt. 678, 10 Atl. 821.

¹⁹ Louderman v. Wilson, 2 Har. & J. (Md.) 379.

One buying property of the defendant estimated to be worth \$300,

to be the correlative of "debt" in this sense, and it may be considered as settled that only such demands as would sustain an action of debt or indebitatus assumpsit by the defendant are debts within the meaning of the garnishment statutes. It has accordingly been held that the garnishee cannot be charged as the debtor of the defendant because of any demand which the latter may have against him, and which is by its terms payable in "store accounts,"²⁰ or "notes,"²¹ or "saddlery,"²² or "castings and iron,"²³ or "cotton,"²⁴ or "board,"²⁵ or "whisky,"²⁶ or "support of the defendant during life,"²⁷ or "mason's work and materials,"²⁸ or "services as attorneys,"²⁹ unless at the time of the garnishment it had been converted into a money demand by the failure of the garnishee to perform his contract according to its terms.³⁰

for which he agreed to pay the expenses of the defendant to California, may be charged therefor. *Moeller v. Quartier*, 14 Ill. 280.

²⁰ *Smith v. Chapman*, 6 Port. (Ala.) 365; *Deaver v. Keith*, 5 Ired. (N. C.) 374.

²¹ *Mims v. Parker*, 1 Ala. 421; *Willard v. Butler*, 14 Pick. 550; *Fuller v. O'Brien*, 121 Mass. 422.

²² *Blair v. Rhodes*, 5 Ala. 648.

²³ *Nesbitt v. Ware*, 30 Ala. 68.

²⁴ *Jones v. Crews*, 64 Ala. 368.

²⁵ *Aldrich v. Brooks*, 25 N. H. 241; *Peebles v. Meeds*, 96 Pa. St. 150.

²⁶ *McMinn v. Hall*, 2 Overt. (Tenn.) 328; *Weil v. Tyler*, 38 Mo. 545, 43 Mo. 581, and 90 Am. Dec. 441.

²⁷ *Dickinson v. Dickinson*, 59 Vt. 678, 10 Atl. 821; *Briggs v. Beach*, 18 Vt. 115.

²⁸ *Wrigley v. Geyer*, 4 Mass. 102; *Boyd v. Brown*, 120 Ind. 393, 22 N. E. 249. Compare *Hurst v. Home Protection Fire Ins. Co.*, 81 Ala. 174, 1 South. 209.

²⁹ *Boyd v. Brown*, 120 Ind. 393, 22 N. E. 249.

³⁰ *Weil v. Tyler*, 38 Mo. 545, 90 Am. Dec. 441; *Blackburn v. Davidson*, 7 B. Mon. (Ky.) 101.

Contingent Debts.

The Rule.

§ 118. A debt to be garnishable must be owing absolutely and beyond contingency at the time the garnishment summons is served.³¹ The decisions on this subject are too numerous to be reviewed separately, but a few classes of cases will serve as explanatory of the rule stated.

Insurance Money before Proof of Loss.

§ 119. It has been held that, when the liability of a company to pay for a loss under an insurance policy is conditioned upon making proof of the loss, the company cannot be charged as garnishee of the policy holder upon a summons served upon it after the loss, and before the required proof of the same has been made; for, although the condition upon which the lia-

³¹ *Wentworth v. Whittemore*, 1 Mass. 471; *Davis v. Ham*, 3 Mass. 33; *Prothingham v. Haley*, Id. 68; *Willard v. Sheafe*, 4 Mass. 235; *Wood v. Partridge*, 11 Mass. 488; *Grant v. Shaw*, 16 Mass. 341, 8 Am. Dec. 142; *Williams v. Marston*, 3 Pick. 65; *Guild v. Holbrook*, 11 Pick. 101; *Faulkner v. Waters*, Id. 473; *Rich v. Waters*, 22 Pick. 563; *Hancock v. Colyer*, 99 Mass. 187, 96 Am. Dec. 730; *Wood v. Buxton*, 108 Mass. 102; *Beverstock v. Brown*, 157 Mass. 565, 32 N. E. 901; *Roberts v. Drinkard*, 3 Metc. (Ky.) 309; *Haven v. Wentworth*, 2 N. H. 93; *Clement v. Clement*, 19 N. H. 460; *Burke v. Whitcomb*, 13 Vt. 421; *Morey v. Sheltus*, 47 Vt. 342; *Sayward v. Drew*, 6 Me. 263; *Woodard v. Herbert*, 24 Me. 358; *Cutter v. Perkins*, 47 Me. 557; *Bishop v. Young*, 17 Wis. 46; *Foster v. Singer*, 69 Wis. 392, 34 N. W. 395; *Strauss v. Railway Co.*, 7 W. Va. 368; *Baltimore & O. Ry. Co. v. Gallahue*, 14 Grat. (Va.) 563; *Russell v. Clingan*, 33 Miss. 535; *Maduel v. Mousseaux*, 29 La. Ann. 228; *Lackett v. Rumbaugh*, 45 Fed. 23; *Garland v. Sperling* (N. M.) 30 Pac. 925, 31 Pac. 499.

bility arises has happened, there is still another condition upon which it may be defeated.³²

Annuity and Rent not Due.

§ 120. On a promise to pay a certain sum on a certain day in each year as long as the annuitant shall live, and at the same rate for any part of the year, the promisor can be charged as garnishee of the annuitant only for the amount which had accrued before the garnishment was served, for it is uncertain that she will live longer.³³ It has been held that a tenant can be charged as garnishee of his landlord only for the rent accrued under his lease, and not for future rent, since the continuance of the relation is uncertain.³⁴

Other Illustrations.

§ 121. When the right of a sailor to demand wages depends upon the completion of the voyage in which they are earned, it was held that the shipowners could not be charged as his garnishees for such wages upon a summons served while the vessel was aground just

³² *Davis v. Davis*, 49 Me. 282; *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880; *Gies v. Bechtner*, 12 Minn. 279 (Gil. 183); *Dowling v. Lancashire Ins. Co.*, 89 Wis. 96, 61 N. W. 76; *Lovejoy v. Hartford Fire Ins. Co.*, 11 Fed. 63; *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich. 201. Contra, *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 6 S. W. 825; *Girard Fire Ins. Co. v. Field*, 45 Pa. St. 129.

Whether proof of loss has been waived is a question for the jury. *Nickerson v. Nickerson*, supra.

³³ *Sabin v. Cooper*, 15 Gray, 532; *Easterly v. Keney*, 36 Conn. 18; *Sayward v. Drew*, 6 Me. 263; *Dickinson v. Dickinson*, 59 Vt. 678, 10 Atl. 821. Contra, *Red v. Powers*, 69 Miss. 242, 13 South. 586.

³⁴ *Thorp v. Preston*, 42 Mich. 511, 4 N. W. 227; *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Blankenship & Blake Co. v. Moore* (Tex. App.) 16 S. W. 780; *Busbaum v. Dunham*, 51 Ill. App. 240. Contra, *Rowell v. Felker*, 54 Vt. 529.

outside of the harbor of her destination; for, if she had been burned or lost there, they would not be indebted to the defendant.³⁵ When a bank takes a draft for collection, it does not become the debtor of the depositor till it is collected, in the absence of contract to the contrary; and whether it will ever collect the money is contingent.³⁶ When the garnishee is bound to pay only after he receives the money from a specified source, there is no debt, properly speaking, till he receives such money, and the case is unlike that of a debt liable to be defeated by a condition subsequent.³⁷

Statutes Making Contingent Debts Garnishable.

§ 122. In Michigan it is provided by statute that the garnishee may be charged "on any contingent right or claim against him in favor of the principal defendant." There a case arose in which the defendant had contracted to build a church for the garnishee, to be paid for on estimates as the work progressed, but 10 per cent. of the estimates was to be retained as a guaranty that the defendant would perform his contract. The plaintiff claimed the right to charge the garnishee for anything that might subsequently become owing for work done under the contract. The court, by Cooley, J., said: "To permit garnishment upon such claims would be a most unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights. * * * If there is a contingent claim here, so there is when a la-

³⁵ *Taber v. Nye*, 12 Pick. 105. For further cases similar to this, see ante, § 63.

³⁶ *Moors v. Goddard*, 147 Mass. 287, 17 N. E. 532.

³⁷ *Sand-Blast File-Sharpening Co. v. Parsons*, 54 Conn. 310, 7 Atl. 716.

borer hires out for a year, to be paid at the end of the year; and his creditors may garnish the claim as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring after the claim was garnished. Whatever, if anything, was due at the time the process was served in this case, the plaintiffs were entitled to reach. The ten per cent. kept back as security for final performance might, perhaps, be considered a sum already contingently earned.”³⁸

Limitations of Rule.

§ 123. This principle has no application to cases in which a liability on the part of the garnishee to the defendant for debt or property actually exists, but which is in dispute between them, or when the contingency only affects the garnishee's liability on a contract which he has actually made, but the force or effect of which is in litigation;³⁹ nor to cases in which only the amount of the liability is uncertain or controverted;⁴⁰

³⁸ Webber v. Bolte, 51 Mich. 113, 16 N. W. 257.

CONTRA: Upon similar facts, the supreme court of Illinois affirmed a judgment against the garnishee for the amount earned at the time the summons was served, although the building was liable to laborers' liens, and there was no such statute. Wilcus v. Kling, 87 Ill. 107.

³⁹ Thorndike v. De Wolf, 6 Pick. 120. Compare Cairo & St. L. Ry. Co. v. Hindman, 85 Ill. 521.

⁴⁰ Downer v. Topliff, 19 Vt. 399; Buchanan County Bank v. Cedar Rapids, I. F. & N. W. Ry. Co., 62 Iowa, 494, 17 N. W. 737; Rowell v. Felker, 54 Vt. 526; Dwinel v. Stone, 30 Me. 384; Ware v. Gowen, 65 Me. 534.

ADJUSTMENT OF INSURED LOSS: So held of liability under policy of insurance after loss, and before adjustment. Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; Girard Fire Ins. Co. v.

nor to cases in which the only contingency is the ability of garnishee to pay, the debt being absolute;⁴¹ nor to attempts to charge the garnishee as custodian for property in his possession; but only refers to indebtedness.⁴²

The contingency must be such as to affect the debt itself, and not simply the liability of the garnishee to have the effects or credits called out of his hands in a particular manner.⁴³

Independent Promises.

§ 124. It may not be inappropriate at this place to notice what are known as "independent promises." One's bargain must be performed according as he makes it, and when, by his contract, he binds himself to perform independent of performance by the other party, it is no defense to a suit on his promise that the other has not performed, and therefore no defense to a garnishment upon it. Thus, when one had covenanted to pay \$500 per month in consideration of a covenant by the other party to the contract to warrant and defend him in the exclusive use of a certain trademark, it was held that he could be charged as garnishee of such other party for installments which were not yet due, regardless of the possibility that such other party would fail to make his warranty good until such installments became due. The court said: "Of

Field, 45 Pa. St. 129, 3 Grant (Pa.) 329; Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.) 328, 29 Am. Dec. 239. But see post, § 149.

⁴¹ Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987.

⁴² Ellis v. Goodnow, 40 Vt. 237.

⁴³ Downer v. Curtis, 25 Vt. 650; Moeller v. Quarrier, 14 Ill. 280; Smith v. Cahoon, 37 Me. 281. Compare Hurst v. Home Protection Fire Ins. Co., 81 Ala. 175, 1 South. 209.

course, the condition, as a condition subsequent, still follows the indebtedness; and if, at any time, the defendant should lose the exclusive use of the trademark through the establishment of a right to it in some other party, its obligation to continue the payments would cease.”⁴⁴

Sales for Cash—Sales Reserving Title Till Payment.

§ 125. Ordinarily, neither the buyer nor the seller can be charged as garnishee of the other by reason of any contract whereby the one agrees to sell and the other to buy any property, whether specific or not; for, in the absence of agreement to the contrary or for the giving of credit, the delivery of the goods and the payment of the price are concurrent conditions, and neither can be enforced without performance or tender of the other.⁴⁵ Though the property sold be delivered to the purchaser, he owes the seller no debt when, by their contract, title does not pass till payment.⁴⁶ In such cases the garnishee may be charged for possession of property belonging to the defendant.⁴⁷

⁴⁴ *Goodman v. Meriden Britannia Co.*, 50 Conn. 139. See, also, *Rowell v. Felker*, 54 Vt. 526.

⁴⁵ *Paul v. Reed*, 52 N. H. 136; *Caldwell v. Stewart*, 30 Iowa, 379; *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 303; *Seymour v. Cooper*, 25 Vt. 141.

⁴⁶ *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 303.

The interest of the vendee in goods sold under contract, reserving title in the vendor till paid for, cannot be reached by garnishing the vendor, who has retaken the goods. Equities cannot be adjusted, nor the balance ascertained and reached, by a garnishment returnable to a justice's court. Justices of the peace cannot exercise equity jurisdiction. *Woodruff v. M. G. McDonald Furniture Co. (Ga.)* 23 S. E. 195.

⁴⁷ *Farrell v. Pearson*, 26 Ill. 463.

Absolute Debts before Maturity.

§ 126. In several of the states it is provided by statute that debts belonging to the defendant, and absolute beyond any contingency, may be attached by garnishment before they have become due or payable.⁴⁸ But, upon principle and authority, the statutes would seem unnecessary, since the law everywhere recognizes the existence of debitum in praesenti solvendum in futuro. Garnishment, when there is no such statute, has the same effect, and attaches any and all debts absolutely owing to the defendant by the garnishee, but not due or payable till some future day.⁴⁹ As the garnishee can be deprived of none of his rights by the garnishment, the entry of the judgment must be de-

⁴⁸ A debt which has yet to originate is not a debt "to become due," within the meaning of these statutes; they refer only to absolute debts. *Thomas v. Gibbons*, 61 Iowa, 50, 15 N. W. 593; *Gies v. Bechtner*, 12 Minn. 279 (Gil. 183); *Nash v. Gale*, 2 Minn. 310 (Gil. 265).

⁴⁹ *Branch Bank v. Poe*, 1 Ala. 396; *Cottrell v. Varnum*, 5 Ala. 229, 39 Am. Dec. 323; *Teague v. Le Grand*, 85 Ala. 493, 5 South. 287; *Walker v. Gibbs*, 2 Dall. 211, 1 Yeates, 255; *Fulweiler v. Hughes*, 17 Pa. St. 440; *Stewart v. West*, 1 Har. & J. (Md.) 536; *Peace v. Jones*, 3 Murph. (N. C.) 256; *Sayward v. Drew*, 6 Me. 263; *Dunnegan v. Byers*, 17 Ark. 492; *Pursell v. Pappenheimer*, 11 Ind. 327; *King v. Vance*, 46 Ind. 246; *Glanton v. Griggs*, 5 Ga. 424; *Willard v. Sheafe*, 4 Mass. 235; *Clapp v. Hancock Bank*, 1 Allen, 394; *Cross v. Brown* (R. I.) 33 Atl. 147, 154; *Nichols v. Schofield*, 2 R. I. 123; *Marble Falls Ferry Co. v. Spitler*, 7 Tex. Civ. App. 82, 25 S. W. 985; *Secor v. Witter*, 39 Ohio St. 218, 230; *Wilcus v. Kling*, 87 Ill. 107; *Sheriff of Fayette v. Buckner*, 1 Litt. (Ky.) 126; *First Nat. Bank v. Brainerd*, 28 Fed. 917. CONTRA, *Childless v. Dickins*, 8 Yerg. (Tenn.) 113; *McMinn v. Hall*, 2 Overt. 328.

NOTE DUE AT OPTION OF MAKER: Held, that a promissory note for a certain amount containing the clause, "I am at my option about paying the principal of this note while I pay the interest annu-

layed in such cases till the debt becomes due,⁵⁰ or else the execution thereon stayed, as the justice of the case may require.⁵¹

Obligations for Payment of Which Defendant Holds Security.

§ 127. The fact that the garnishee has pledged or mortgaged certain of his property to the defendant, as security for the payment of his debt, does not render him any the less indebted, and therefore he may be charged on account of such secured debt: for the lien of the pledge or mortgage only exists until payment, and, though the garnishment does not operate to divest the lien, the garnishee can release his property by payment into court under the garnishment, the same as by payment to the defendant.⁵² Such payment is

ally," shows a garnishable demand for the whole amount of the note. *Fay v. Smith*, 25 Vt. 610.

RENT ACCRUING: A lease demised a term of years "from the first day of September now next ensuing," and reserved a rent payable "by equal quarter-yearly payments," the first payment "to be made on the first day of December now next ensuing." Held, that the rent was not legally due, and consequently not subject to garnishment as personalty, until after midnight of December 1st. *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646.

⁵⁰ *Wilson v. Albright*, 2 G. Greene (Iowa) 125; *Secor v. Witter*, 39 Ohio St. 218, 230.

⁵¹ *Anderson v. Wanzer*, 5 How. (Miss.) 587, 37 Am. Dec. 170; *Red v. Powers*, 69 Miss. 242, 13 South. 586; *Cottrell v. Varnum*, 5 Ala. 229, 39 Am. Dec. 323; *Marble Falls Ferry Co. v. Spitler*, 7 Tex. Civ. App. 82, 25 S. W. 985.

⁵² *Caldwell v. Stewart*, 30 Iowa. 379; *Culver v. Parish*, 21 Conn. 408; *McGurren v. Garrity*, 68 Cal. 566, 9 Pac. 839; *Nesbitt v. Campbell*, 5 Neb. 429; *Courtney v. Carr*, 6 Iowa, 238.

GARNISHEE'S MONEY IN DEFENDANT'S HANDS: When a street-railway company disclosed as garnishee that it owed the de-

a good defense to a suit to foreclose the mortgage.⁵³ When the debt for which the garnishee is charged is secured to the defendant in any manner, the garnishment transfers the security to the plaintiff, who may enforce payment of the garnishment judgment by foreclosing this security.⁵⁴

defendant \$6.75 for wages as conductor, but that he owed the company \$4.57 for money received by him, and for tickets intrusted to him to sell of the value of \$5, which by his contract he was bound to account for in the settlement for his wages, held, that the garnishee must be discharged. *Fellows v. Smith*, 131 Mass. 362. Compare *Sauer v. Nevada*, 14 Colo. 54, 23 Pac. 87.

SALES ON CONTRACT RESERVING TITLE: When the garnishee has received property under contract to purchase, and that title shall remain in the seller till entirely paid for, there is no debt. *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 303. The garnishee may then be charged for property in his possession. *Farrell v. Pearson*, 26 Ill. 463.

GARNISHEE'S PROPERTY CASUALLY IN DEFENDANT'S HANDS: The fact that the defendant has property in his possession belonging to the garnishee is, of course, no defense to the garnishment. *Rankin v. Simonds*, 27 Ill. 352.

DELIVERING UP MORTGAGE: Held that, when a mortgage debt is garnished, the garnishee is entitled to have the mortgage delivered up or indemnity given before judgment is entered against him. *Timmons v. Johnson*, 15 Iowa, 23.

⁵³ *Dickinson v. Dickinson*, 59 Vt. 678, 10 Atl. 821; *Blaisdell v. Bowers*, 40 Vt. 126; *Greenman v. Fox*, 54 Ind. 267; *Fowler v. Doyle*, 16 Iowa, 534; *Pine v. Shannon*, 30 N. J. Eq. 404. Compare *Lawrence v. Lane*, 9 Ill. (4 Gilm.) 354.

NEGOTIABILITY OF MORTGAGE NOTE: The fact that a note is payable "according to the condition of the mortgage" does not destroy its negotiability when there is nothing in the mortgage repugnant to it. *Littlefield v. Hodge*, 6 Mich. 326.

⁵⁴ *Als Dorf v. Reed*, 45 Ohio St. 653, 17 N. E. 73; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563; *Campbell v. Nesbitt*, 7 Neb. 300.

PURCHASE MONEY LIEN: The garnishee's debt being for the purchase of land, he could not set up the exemption of it as a homestead when levied on under a judgment for such purchase price, and

Debts for Which the Garnishee has Given His Note.

Negotiability and Rights of Holder Determined.

§ 128. Attempts to charge the makers of promissory notes as garnishees of the payees or holders have entailed much litigation, and resulted in a great variety of decisions in the different states; yet there are certain rules which may be regarded as established. The character of any paper, as to whether negotiable or not, the liability of the maker, and the person to whom he is liable, whether payee, indorsee, or garnishing creditor, are determined by the law of the state which determines the obligations of the contract, usually the *lex loci contractus*.⁵⁵

Nonnegotiable Notes.

§ 129. In those states in which the maker of any nonnegotiable note may urge against the assignee of such note any defense which arose before he received

therefore cannot claim the exemption against execution on the garnishment judgment rendered against him on account of such indebtedness. *White v. Simpson* (Ala.) 18 South. 151.

CONTRA: When a sheriff was liable for moneys collected, and was charged as garnishee therefor, it was held that the plaintiff could not sue the sheriff's bondsmen to compel payment of the garnishment judgment. *Graham v. Endicott*, 7 Cal. 145. Compare *Ross v. Heintzen*, 36 Cal. 313, 321.

⁵⁵ *Hull v. Blake*, 13 Mass. 153; *Baylies v. Houghton*, 15 Vt. 626; *Chase v. Haughton*, 16 Vt. 594; *Emerson v. Partridge*, 27 Vt. 8, 62 Am. Dec. 617; *Wheeler v. Winn*, 38 Vt. 122; *Ludlow v. Bingham*, 4 U. S. 47; *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504; *Green v. Gillett*, 5 Day (Conn.) 485.

NOTE PAYABLE IN ANOTHER STATE: Held, that the maker of a note payable out of the state cannot be charged as garnishee

notice of the assignment, and which would be good against the payee, the maker of any such note may be charged as garnishee of the last known holder, for payment under the garnishment will be a good defense against any previous bona fide assignment of which he had no notice.⁵⁶ On the other hand, in those states in which the maker of such a note cannot set up any defense against the assignee which arose against the former holder after the assignment, but before notice thereof to the maker,—in other words, in those states in which the assignment is complete without notice,—the maker of such a note, for the same reason, cannot be charged as garnishee of the last known holder,⁵⁷ unless it is absolutely shown that he was the actual holder at the time of the garnishment, or the plaintiff executes to the garnishee a good and ample bond of indemnity.

Notes in Possession of Maker.

§ 130. When a negotiable note is in the actual control of the maker at the time he is summoned as garnishee of the owner, he may be charged for the debt represented thereby, though the note still retained its negotiable character, for the reason for exempting

therefor. *Chadbourne v. Gillmore*, 63 N. H. 452; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791. *Contra*, *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134. See, also, *ante*, § 60.

⁵⁶ *Yocum v. White*, 36 Iowa, 288; *Comstock v. Farnum*, 2 Mass. 96; *Clark v. King*, 2 Mass. 524; *Covert v. Nelson*, 8 Blackf. (Ind.) 265; *Junction Ry. Co. v. Cleneay*, 13 Ind. 161; *Shetler v. Thomas*, 16 Ind. 223; *Canaday v. Detrick*, 63 Ind. 485; *Elston v. Gillis*, 69 Ind. 128; *Dore v. Dawson*, 6 Ala. 712; *Robinson v. Mitchell*, 1 Har. (Del.) 365.

⁵⁷ *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Speight v. Brock*, *Freem. Ch. (Miss.)* 389.

such demands from garnishment does not apply to this class of cases.⁵⁸

Statutes Making All Note Debts Garnishable as Simple Debts.

§ 131. In some states the law merchant has been abrogated, and the negotiability of all paper destroyed, by statutes declaring them subject in the hands of a bona fide indorsee to any defense available against the payee,⁵⁹ or by declaring the maker of any negotiable note subject to garnishment therefor in a suit against the payee, at any time before the note is transferred and notice thereof given to the maker;⁶⁰ and

⁵⁸ *Stone v. Dean*, 5 N. H. 502; *Marble Falls Ferry Co. v. Spitler*, 7 Tex. Civ. App. 82, 25 S. W. 985; *Simmons v. Carmichael* (Tex. Civ. App.) 28 S. W. 690.

When one of two joint makers has possession, he cannot be charged as sole debtor. *Wilson v. Albright*, 2 G. Greene (Iowa) 125.

⁵⁹ *Britton v. Preston*, 9 Vt. 257.

⁶⁰ *Kimball v. Gay*, 16 Vt. 131; *Chase v. Haughton*, 16 Vt. 594; *Barney v. Douglas*, 19 Vt. 98; *Amoskeag Manuf'g Co. v. Gibbs*, 8 Fost. (N. H.) 316.

DECISIONS UNDER VERMONT STATUTES: In 1836 a statute of this kind in Vermont was repealed, and the effect of the repeal was to put all negotiable notes on the footing of mercantile paper in a commercial country. *Hinsdill v. Safford*, 11 Vt. 309; *Little v. Hale*, Id. 482; *Hutchins v. Evans*, 13 Vt. 541. This last decision was given in 1841, and the same year the legislature of Vermont passed a statute subjecting all negotiable paper to attachment. *Kimball v. Gay*, 16 Vt. 131; *Sargent v. Wood*, 51 Vt. 597; *Ayott v. Smith*, 40 Vt. 532.

In the hands of banks the common-law quality of the paper is retained, and the holder prevails over the garnishor, whether the transfer was before or after the garnishment. *National Bank of Newbury v. Webster*, 47 Vt. 43; *Hall v. Bowker*, 44 Vt. 77. Under this statute, a maker of a note is garnishable in a suit against an indorsee of the note, unless, before being served, he had notice of a transfer by him to another. *Seward v. Garlin*, 33 Vt. 583. Notes in the

under these statutes all notes are subject to the same rules as those above stated as applying to notes nonnegotiable at common law.⁶¹

Overruled Decisions to Same Effect.

§ 132. In Maryland and Missouri, without any such statute, it has been held that the maker of any note may be charged as garnishee of the payee before maturity of the note upon proof that he was the owner at the time of the garnishment;⁶² and that a judgment against the maker of a note as garnishee in a suit against an indorsee who owned it at the time of the garnishment is conclusive against a subsequent indorsee for value, before maturity and without notice.⁶³ But in 1855 the Missouri decisions were superseded by

hands of banks are exempt from garnishment only when received in the ordinary course of business. *Farmers' & Mechanics' Bank v. Drury*, 35 Vt. 468.

⁶¹ *Id.*

⁶² *Stewart v. West*, 1 Har. & J. (Md.) 536; *Scott v. Hill*, 3 Mo. 88, 22 Am. Dec. 462; *Colcord v. Daggett*, 18 Mo. 557.

NOTICE OF TRANSFER—RIGHT OF TRANSFEREE TO RECOVER OF PLAINTIFF: Held, that the garnishee could be charged, though he answered that he had been informed that the note had been assigned. *Quarles v. Porter*, 12 Mo. 76. *Contra*, *Walden v. Valiant*, 15 Mo. 409. "As the judgment is not conclusive against him [the purchaser before maturity] unless he has notice, and chooses to come in and interplead, he would have a right at any subsequent time, before the money was paid over to the attaching creditor, to arrest the payment, or, after payment, a right to his action to recover it back." *Quarles v. Porter*, 12 Mo. 76; *Colcord v. Daggett*, 18 Mo. 557; *Garrott v. Jaffrey*, 10 Bush (Ky.) 413. *Contra*, *Funkhouser v. How*, 24 Mo. 44; *Dickey v. Fox*, *Id.* 217; *Corey v. Webber*, 96 Mich. 357, 55 N. W. 982.

⁶³ *Somerville v. Brown*, 5 Gill (Md.) 399.

Held, that the maker of a note overdue cannot be charged as garnishee of the owner, an indorsee. *May v. Baker*, 15 Ill. 89.

statute, and in 1879 the Maryland decisions above cited were overruled by a unanimous court;⁶⁴ so that now the law in these states conforms with the rule which prevails elsewhere.

Debts Evidenced by Notes in Circulation—How Garnishable.

§ 133. When the consideration of the question is not embarrassed by legislative enactment, the vast preponderance of authority is in favor of the rule that the right of an indorsee for value before maturity cannot be defeated by any previous garnishment of which he had no notice;⁶⁵ and therefore the maker cannot be charged as garnishee of the payee of any outstanding negotiable instrument under garnishment served before its maturity,⁶⁶ unless it is affirmatively shown that before the rendition of the judgment such paper

⁶⁴ Cruett v. Jenkins, 53 Md. 217.

⁶⁵ Howe v. Ould, 28 Grat. (Va.) 1; Mason v. Noonan, 7 Wis. 609; State v. Judge of County Court, 11 Wis. 50; Littlefield v. Hodge, 6 Mich. 326; Corey v. Webber, 96 Mich. 357, 55 N. W. 982; Hubbard v. Williams, 1 Minn. 54, 55 Am. Dec. 66; Commissioners of Jefferson Co. v. Fox, Morris (Iowa) 48; Gillam v. Huber, 4 G. Greene (Iowa) 155; Myers v. Beeman, 9 Ired. (N. C.) 116; Ormond v. Moye, 11 Ired. (N. C.) 564; Yarborough v. Thompson, 11 Miss. 291, 41 Am. Dec. 626.

⁶⁶ Id.; Hinsdill v. Safford, 11 Vt. 309; Hutchins v. Evans, 13 Vt. 540; Greer v. Powell, 1 Bush (Ky.) 489; Karp v. Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680; Littlefield v. Hodge, 6 Mich. 326; Carson v. Allen, 2 Chand. (Wis.) 123, 2 Pin. 457, 54 Am. Dec. 148; Wilson v. Albright, 2 G. Greene (Iowa) 125; Gregory v. Higgins, 10 Cal. 339; Gaffney v. Bradford, 2 Bailey (S. C.) 441; Sheets v. Culver, 14 La. 449; 32 Am. Dec. 593; Kimball v. Plant, 14 La. 511; Erwin v. Commercial & Railroad Bank, 3 La. Ann. 186; Denham v. Pogue, 20 La. Ann. 195; Iglehart v. Moore, 21 Tex. 105; Price v. Brady, Id. 614; Kapp v. Teel, 33 Tex. 811; Wybrants v. Rice, 3 Tex. 458; Kieffer v. Ehler, 18 Pa. St. 388; Mayberry v. Morris, 62 Ala. 113; Thompson v. Shelby, 11 Miss. 296; Howe v. Hartness, 11 Ohio St. 449, 456.

PAPER PAYABLE ON DEMAND: As to when paper payable

had become overdue, and was still the property of the defendant;⁶⁷ nor upon a summons served after its maturity, unless the defendant was the owner at the time

on demand becomes overdue, see *Culver v. Parish*, 21 Conn. 408; *Howe v. Hartness*, 11 Ohio St. 449.

A SAVINGS BANK PASS BOOK is not a negotiable instrument, although the deposit is payable to order or the bearer of the book. Therefore the deposit is subject to garnishment. *Witte v. Vincenot*, 43 Cal. 325; *Nichol v. Schofield*, 2 R. I. 123. See, also, ante, § 46, note.

PROOF OF NEGOTIABILITY: The court will not presume that the note is negotiable; the garnishee must show the fact. *Gatchell v. Foster*, 94 Ala. 622, 10 South. 434.

PURPOSE OF GIVING NOTE: It is immaterial that the garnishee may have executed the note for the purpose of enabling his creditor to keep the proceeds out of the reach of creditors. *Willis v. Heath*, 75 Tex. 124, 12 S. W. 971; *Wood v. Bodwell*, 12 Pick. 268.

⁶⁷ *Id.*; *Mims v. West*, 38 Ga. 18, 95 Am. Dec. 379; *Huff v. Mills*, 7 Yerg. (Tenn.) 42; *Moore v. Green*, 4 Humph. (Tenn.) 299; *Daniel v. Rawlings*, 6 Humph. (Tenn.) 403; *Matheny v. Hughes*, 10 Heisk. (Tenn.) 401; *Secor v. Witter*, 39 Ohio St. 218, 230; *Briant v. Reed*, 14 N. J. Eq. 271; *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330; *Junction Ry. Co. v. Cleneay*, 13 Ind. 161; *Cleneay v. Junction Ry. Co.*, 26 Ind. 375; *King v. Vance*, 46 Ind. 246; *Bills v. National Park Bank*, 89 N. Y. 343, 349; *Bassett v. Garthwaite*, 22 Tex. 230, 73 Am. Dec. 257; *Thompson v. Gainsville Nat. Bank*, 66 Tex. 156, 18 S. W. 350; *Kieffer v. Ehler*, 18 Pa. St. 388; *Hill v. Krofts*, 29 Pa. St. 186; *Day v. Zimmerman*, 68 Pa. St. 72, 8 Am. Rep. 157; *Skinner v. Moore*, 2 Dev. & B. (N. C.) 138, 30 Am. Dec. 155; *Mayberry v. Morris*, 62 Ala. 113; *Timm v. Stegman*, 6 Wash. 1004, 32 Pac. 1004; *Enos v. Tuttle*, 3 Conn. 27; *Snider v. Ridgeway*, 49 Ill. 522; *Patton v. Gates*, 67 Ill. 164; *Prout v. Grout*, 72 Ill. 456.

CONCLUSION OF REVIEW OF DECISIONS: The reader will find a very elaborate review of the decisions upon this subject in *Drake on Attachments* (sections 573-593), from which that writer draws the rule above stated, and concludes as follows: "In concluding this review of the reported decisions in this country on this important subject, it is proper to remark that in none of the states where the attachment of negotiable paper has been sustained are the statutory provisions as to the general scope and effect of an at-

the garnishment was served.⁶⁸ But, if he was, the garnishee cannot defeat the garnishment by payment to a subsequent transferee for value, without notice.⁶⁹

tachment more comprehensive than in those states where the contrary position is taken. In every state the defendant's 'credits' may be attached; and that term is, as to this question, fully as comprehensive as if the statute also authorized (as is frequently the case) the attachment of 'rights' or 'effects.' " *Id.* § 590.

PRESUMPTION AS TO TRANSFER: As it is presumed that the transfer was made at or about the time of making the instrument, the burden is upon the plaintiff to show that the indorsement was made after maturity. *Mason v. Noonan*, 7 Wis. 609; *Karp v. Citizens' Nat. Bank*, 76 Mich. 679, 43 N. W. 680; *Bassett v. Garthwaite*, 22 Tex. 230, 73 Am. Dec. 257. Held, that this presumption is of the weakest character, and slight evidence is sufficient to destroy it. *Hill v. Kroft*, 29 Pa. St. 186.

EXECUTING NEW NOTE AFTER GARNISHMENT: If the maker of negotiable paper is summoned as garnishee before its maturity, and after being summoned, and after the maturity of the paper, takes it up from the payee, and gives him another negotiable instrument in extension of the debt, he should be charged as garnishee on the original note. He cannot thus defeat the rights of the plaintiff, and it makes no difference that he does not know who holds the second note, and the same is not matured. *Leslie v. Merrill*, 58 Ala. 322, approved and followed in *Thompson v. Gainesville Nat. Bank*, 66 Tex. 156, 18 S. W. 350.

DEFENSE THAT DEBT IS IN A NOTE MUST BE SET UP BEFORE JUDGMENT: The defense that the debt is evidenced by negotiable paper must be set up at the trial, and will not sustain a motion to suspend execution after the garnishee has paid the indorsee of the note. *Gatchell v. Foster*, 94 Ala. 622, 10 South. 434.

⁶⁸ *Bassett v. Garthwaite*, 22 Tex. 230, 73 Am. Dec. 257; *Warne v. Kendall*, 78 Ill. 598.

OVERDUE NOTES NOT GARNISHABLE: Held, that the maker of a promissory note is not subject to garnishment therefor in any case, whether the note is due or not. *Davis v. Pawlette*, 3 Wis. 300, 62 Am. Dec. 690.

⁶⁹ *Burton v. Wynne*, 55 Ga. 615.

Debts Evidenced by Note Overdue.

§ 134. The garnishee may always be charged for a debt he owes upon an overdue note belonging to the defendant.⁷⁰ In some states it is held that negotiable paper does not entirely lose its negotiable character by becoming overdue, in this: that a transfer binds the maker without notice to him, so as to deprive him of the defense of payment by garnishment in a suit against the payee after the transfer, but before receiving notice of it.⁷¹ But the better rule would seem to be that one who takes an overdue note takes it subject to all the equities existing between the original parties, and therefore subject to the defense of payment under a subsequent garnishment, before the maker received notice of the transfer.⁷² Upon what conditions the maker of an overdue note can be charged as garnishee of course depends upon which of these rules governs the note in question, as stated at the beginning of this title.⁷³

Note must be Surrendered or Bond Given.

§ 135. Ordinarily, the garnishee is entitled to have the paper produced and delivered up before payment;

⁷⁰ *Stevens v. Pugh*, 12 Iowa, 430; *Dore v. Dawson*, 6 Ala. 712; *Mills v. Stewart*, 12 Ala. 90; *Snider v. Ridgeway*, 49 Ill. 522; *Patton v. Gates*, 67 Ill. 164.

⁷¹ *Kinsley v. Evans*, 34 Ohio St. 158; *Edney v. Willis*, 23 Neb. 56, 36 N. W. 303; *Shuler v. Bryson*, 65 N. C. 201.

⁷² *McCoid v. Beatty*, 12 Iowa, 299; *Stevens v. Pugh*, Id. 430; *Mills v. Stewart*, 12 Ala. 90; *Austin v. Ryan*, 51 Vt. 110; *Thompson v. Gainesville Nat. Bank*, 66 Tex. 156, 18 S. W. 350; *Culver v. Parish*, 21 Conn. 408. See, also, ante, § 129.

⁷³ Ante, § 128.

and therefore, before judgment against him, he is entitled to this,⁷⁴ or an indemnity as in case of a lost note,⁷⁵ unless all danger of his being compelled to pay it a second time has passed.

Requiring Defendant to Hold or Produce.

§ 136. For the purpose of making the garnishment effectual, and preventing a fraud upon the law by the defendant negotiating the note after the garnishment, it has been said that the court may require the note to be placed in such custody as will prevent it from being misapplied, taking care that it shall be demanded at

⁷⁴ Karp v. Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680; Shuler v. Bryson, 65 N. C. 201; Timmons v. Johnson, 15 Iowa, 23.

THE GARNISHEE MAY WAIVE RETURN AND BOND: This provision is solely for the garnishee's benefit, and his failure to demand it does not affect the protective force of the proceedings. No one else can complain. Yocum v. White, 36 Iowa, 288.

STATUTORY BOND: When the statute provides that, in any case in which it is doubtful whether the defendant or another owns the debt, the court may require the plaintiff to give the garnishee a bond of indemnity, the refusal of the court to require the plaintiff to give a bond to the garnishee savings bank, because the defendant has not surrendered his pass book, is discretionary, and not subject to review. Maloney v. Casey (Mass.) 41 N. E. 104.

⁷⁵ Shuler v. Bryson, 65 N. C. 201; Pickler v. Rainey, 4 Heisk. (Tenn.) 335.

JUDGMENT AGAINST GARNISHEE BEFORE MATURITY OF NOTE: Held, that the maker of a note, while the same is current, cannot be charged as garnishee of the payee, for the probability is so great that the debtor may have transferred it that it would be too great a hardship to compel the maker to pay the money and resort to his indemnity. Gaffney v. Bradford, 2 Bailey (S. C.) 441.

"Protection being secured to the maker, the reason of the law for not subjecting him to garnishment has ceased, and the plaintiff should be entitled to the benefit of his indebtedness to the defendant." Thompson v. Gainesville Nat. Bank, 66 Tex. 156, 18 S. W. 350.

maturity, and proper notice be given to indorsers, if necessary.⁷⁶

Colorable Indorsements and Holders with Notice.

§ 137. If it is shown that the negotiation of the note is a mere cover to defeat the garnishment, and that the indorsee is a party to the scheme, or that it is made payable to another than the owner, for the same purpose, the garnishee will be charged the same as if no transfer had been made or it had been made payable to the owner;⁷⁷ and the same has been held though the indorsee merely had notice of the garnishment, and paid full value.⁷⁸ But this notice must be actual knowledge. The doctrine of notice by lis pendens is wholly inapplicable to such cases.⁷⁹

⁷⁶ Kieffer v. Ehler, 18 Pa. St. 388; Stone v. Elliott, 11 Ohio St. 252, 259.

Held, that equity will interpose, on the application of the plaintiff, against an indorsee with actual notice of the attachment, to restrain him from transferring the note before due, so as to defeat the garnishment. Secor v. Witter, 39 Ohio St. 218, 235.

⁷⁷ Clough v. Buck, 6 Neb. 343; Bills v. National Park Bank, 89 N. Y. 343; Enos v. Tuttle, 3 Conn. 27; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378; King v. Vance, 46 Ind. 246; Patton v. Gates, 67 Ill. 164; Briant v. Reed, 14 N. J. Eq. 271; Secor v. Witter, 39 Ohio St. 218, 232.

The garnishee may be charged for his indebtedness to the defendant, evidenced by a note in the plaintiff's possession, which the defendant caused to be made payable to a third person, and by him transferred, without consideration, to a co-garnishee, for the purpose of defrauding the defendant's creditors. First Nat. Bank of Hailey v. Van Ness (Idaho) 43 Pac. 59.

⁷⁸ Culver v. Parish, 21 Conn. 408.

⁷⁹ Mims v. West, 38 Ga. 18; Mayberry v. Morris, 62 Ala. 113; Kieffer v. Ehler, 18 Pa. St. 388; Day v. Zimmerman, 68 Pa. St. 72, 8 Am. Dec. 157; Stone v. Elliott, 11 Ohio St. 253; Secor v. Witter, 39 Ohio St. 218; County of Warren v. Marcy, 97 U. S. 96, 105.

Debts to Pay Which Check has been Given.

§ 137a. The fact that the garnishee has drawn a check or bought a draft to pay the debt for which the plaintiff seeks to charge him is no defense to the garnishment so long as the check or draft is in the control of the garnishee,⁸⁰ even though it has been delivered to the defendant personally, and by him taken away to be cashed, provided it has found its way back to the control of the drawer unpaid at the time of the garnishment.⁸¹ But when an insurance company, through its agent, agreed to send a cashier's check for \$402.27 to such agent, payable to the order of the principal defendant, in consideration of such defendant's surrendering his policy, it was held that, for the purpose of receiving and delivering the check, the insurance agent was the agent of the defendant, and mailing the check to the agent was such a payment to the defendant as to defeat a garnishment of the company before the check reached its destination.⁸²

Likewise, when an employe of a town was indebted to one of the selectmen, and also in an uncertain amount to the town, and the town, in settling the employe's accounts for the year, by consent of all parties, gave the check to the selectman, in order that he might retain the sums due from the employe to the town and to himself, and while the selectman held the check the town was garnished in a suit against the employe, it

⁸⁰ *Marble Falls Ferry Co. v. Spittler*, 7 Tex. Civ. App. 82, 25 S. W. 985.

⁸¹ *Dennie v. Hart*, 2 Pick. 204; *Simmons v. Carmichael* (Tex. Civ. App.) 28 S. W. 690.

⁸² *Campbell v. Hanney* (R. I.) 33 Atl. 444.

was held that the selectman was the agent of the defendant to receive and appropriate the amount of the check, and not the agent of the town; that the town could not revoke the check; and the check operated as payment.⁸³

When the garnishee, before being summoned, had delivered a check to the defendant in payment of the debt sought to be garnished, it was held that the receiving of the check by the defendant operated as payment, at least until presentment and refusal, and therefore the garnishee could not be charged.⁸⁴

In England it is held that, if a garnishee is summoned after he has delivered to the defendant a check in payment of the debt for which the plaintiff seeks to charge him, he is liable if he stops payment of the check.⁸⁵

But the supreme court of Rhode Island held that, the garnishee having paid his debt to the defendant by check, which the latter had transferred for value before the garnishee was served, the check operated as payment, so as to prevent charging the garnishee, although he could and did stop payment of it.⁸⁶

Interest Due on Indebtedness.

While Payment is Prevented by Process.

§ 138. Clearly, interest due or earned by the garnished debt before the garnishment is a part of the

⁸³ Barnard v. Graves, 16 Pick. 41.

⁸⁴ Getchell v. Chase, 124 Mass. 366.

⁸⁵ Cohen v. Hale, 3 Q. B. Div. 372.

⁸⁶ National Park Bank v. Levy, 17 R. I. 746, 24 Atl. 777.

A master in chancery, having money in bank for distribution, had checked out all but the share due the defendant, and gave him

debt itself, and is attached by the process; but the question of difficulty is as to whether the garnishee may be charged with interest on the debt garnished during the period the suit is pending. On the one hand, it may be said that one prevented by legal process from discharging his obligation should not be charged with interest.⁸⁷ On the other hand, it is said that, if he would avoid interest, he should, where the statute allows it, pay the money into court, and get a release from further liability.⁸⁸ But these are extreme views, and the general doctrine is that if the garnishee holds the fund at all times ready to pay into court, and set apart for that purpose, and does not use

a check for such balance. The defendant immediately turned over the check in payment of a debt, and later, on the same day, the bank was garnished as his debtor, before the check was presented for payment. The court held that, the check being for the whole of a fund equitably belonging to the payee, title passed with it, and with a transfer of it, and the garnishee could not be charged. *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Atl. 342.

As to checks as assignment of fund drawn on, see ante §§ 70-72.

⁸⁷ *Prescott v. Parker*, 4 Mass. 170; *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. (Mass.) 1; *Fitzgerald v. Caldwell*, 2 Dall. 215; *Blair v. Porter*, 13 N. J. Eq. 267, 270; *Chase v. Manhardt*, 1 Bland (Md.) 333; *Mackey v. Hodgson*, 9 Pa. St. 468; *Lyman v. Orr*, 26 Vt. 121; *Willings v. Consequa*, Pet. C. C. 301, Fed. Cas. No. 17,767; *Little v. Owen*, 32 Ga. 20; *Cowen v. St. Louis Perpetual Ins. Co.*, 11 Mo. 374; *Clark v. Powell*, 17 La. Ann. 177; *Irwin v. Pittsburg Ry. Co.*, 43 Pa. St. 488; *Jackson v. Lloyd*, 44 Pa. St. 82; *Stevens v. Barringer*, 13 Wend. 639; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978.

⁸⁸ *Chase v. Manhardt*, 1 Bland (Md.) 333; *Tazewell v. Barrett & Co.*, 4 Hen. & M. (Va.) 259; *Ross v. Austin*, Id. 502; *Templeman v. Fauntleroy*, 3 Rand. (Va.) 434; *Work v. Glaskins*, 33 Miss. 539; *Smith v. German Bank*, 60 Miss. 69; *Cross v. Brown* (R. I.) 33 Atl. 147, 154; *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571; *McCans v. Board's Heirs*, 1 Dana (Ky.) 340. Compare *Lyman v. Orr*, 26 Vt. 122; *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. (Mass.) 10.

any of it meantime, or acquire any profit from it, he is not chargeable with interest.⁸⁹

When Garnishee Seeks to Profit by the Process.

§ 139. On the other hand, if he assumes the attitude of a litigant,⁹⁰ or intentionally hinders and delays the proceedings for the purpose of retaining the fund or by connivance with the defendant,⁹¹ or in cases where the defendant could have recovered interest during the period if no suit had been brought, and the garnishee has mingled the property with his own, and used it, or profited from the possession of it,—in any and all of these cases clearly he should be chargeable with interest, and such is the law.⁹² A debtor cannot stop the running of interest on his debt by garnishing himself in his suit against his creditor.⁹³ In most of the states it will be presumed, in the absence of evidence, that the garnishee was always ready and will-

⁸⁹ *Candee v. Webster*, 9 Ohio St. 458; *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. (Mass.) 1; *Mustard v. Union Nat. Bank*, 86 Me. 177, 29 Atl. 977; *Allegheny Sav. Bank v. Meyer*, 59 Pa. St. 361; *Lockett v. Rumbaugh*, 45 Fed. 23.

⁹⁰ *Chase v. Manhardt*, 1 Bland (Md.) 333; *Georgia Insurance & Trust Co. v. Oliver*, 1 Ga. 38; *Stevens v. Gwathmey*, 9 Mo. 636; *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *Shahan v. Tallman*, 39 Kan. 185, 17 Pac. 823.

⁹¹ *Fitzgerald v. Caldwell*, 2 Dall. 215; *Jones v. Manufacturers' Nat. Bank*, 99 Pa. St. 317; *Rushton v. Rowe*, 64 Pa. St. 63; *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. (Mass.) 1, 11; *Lyman v. Orr*, 26 Vt. 122. Compare *Risser v. Rathburn*, 71 Iowa, 113, 32 N. W. 198.

⁹² *Candee v. Skinner*, 40 Conn. 464; *Woodruff v. Bacon*, 35 Conn. 97; *Adams v. Cordis*, 25 Mass. 260, 267; *Risser v. Rathburn*, 71 Iowa, 113, 32 N. W. 200; *Mattingly v. Boyd*, 20 How. 128; *Willings v. Consequa*, Pet. C. C. 300, Fed. Cas. No. 17,767; *Brown v. Silsby*, 10 N. H. 521; *Abbott v. Stinchfield*, 71 Me. 213; *Baker v. Central Vermont Ry. Co.*, 56 Vt. 302.

⁹³ *Willings v. Consequa*, Pet. C. C. 301, Fed. Cas. No. 17,767.

ing to pay on demand, and therefore is not chargeable with interest.⁹⁴

Investing Funds—Interest as Damages.

§ 140. Of course, the garnishee is under no duty to invest the funds, as many custodians are; but, on the contrary, it is his duty always to have the funds ready to pay immediately as the court may direct.⁹⁵ If the interest is chargeable only as damages for wrongful detention of the funds, clearly there is no wrongful detention while payment is prevented by legal process, and therefore no interest can be charged for that period.⁹⁶

Plaintiff Stands in Defendant's Shoes.

§ 141. When the defendant could not have charged the garnishee interest during the period if the suit had not been commenced, clearly he is not liable to the plaintiff for interest, for the plaintiff stands in the defendant's shoes, and acquires his rights only.⁹⁷

⁹⁴ Norris v. Hall, 18 Me. 332; Blodgett v. Gardiner, 45 Me. 542; Georgia Trust & Insurance Co. v. Oliver, 1 Ga. 38; Adams v. Cordis, 8 Pick. 260, 268; Willings v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17,767; Stevens v. Gwathmey, 9 Mo. 636; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790. CONTRA, Candee v. Webster, 9 Ohio St. 452. As to Maryland, Virginia, Mississippi, and Kentucky, see ante, § 138.

⁹⁵ Candee v. Skinner, 40 Conn. 464, 468; Mattingly v. Boyd, 20 How. 128; Updegraff v. Spring, 11 Serg. & R. (Pa.) 188.

⁹⁶ Adams v. Cordis, 8 Pick. (Mass.) 260; Oriental Bank v. Tremont Ins. Co., 4 Metc. (Mass.) 1, 7; Rennell v. Kimball, 5 Allen (Mass.) 356, 367; Bickford v. Rich, 105 Mass. 340; Huntress v. Burbank, 111 Mass. 213; Smith v. Flanders, 129 Mass. 322; Mustard v. Union Nat. Bank, 86 Me. 177, 29 Atl. 977; Albion Lead Works v. Citizens' Ins. Co., 3 Fed. 197; Bridges v. Sheldon, 7 Fed. 17, 40. But see Cross v. Brown (R. I.) 33 Atl. 147, 154.

⁹⁷ Lyman v. Orr, 26 Vt. 122; Oriental Bank v. Tremont Ins. Co., (174)

Liability Over to Defendant after Garnishment.

§ 142. On the other hand, if the plaintiff could not recover interest for the period the suit is pending, the defendant cannot afterwards recover it in an action against the garnishee, the garnishment having been defeated or discontinued.⁹⁸ But, if the garnishment proceedings are manifestly void, interest is chargeable.⁹⁹ It is held that the suit relieves the garnishee from the payment of interest only on the amount claimed by the plaintiff in the suit, and a liberal allowance for costs and expenses.¹⁰⁰

Demands in Suit or Judgment.*Not Garnishable after Issue Joined.*

§ 143. It has been held that a garnishee can never be charged by reason of anything he may owe the defendant upon any demand upon which suit is pending against him commenced by the defendant before the garnishment summons was served;¹⁰¹ and, although this position has been abandoned,¹⁰² it is still the law in some states that debts in suit are liable to garnish-

4 Metc. (Mass.) 1; Quigg v. Kittredge, 18 N. H. 137; Thompson v. Stewart, 3 Conn. 171, 184, 8 Am. Dec. 168.

⁹⁸ Mackey v. Hodgson, 9 Pa. St. 468; Updegraff v. Spring, 11 Serg. & R. (Pa.) 188; Webber v. Carter, 1 Phila. (Pa.) 221.

When the garnishee was sued before he was garnished, and the garnishment did not stay the suit, held, that it did not stop interest. Albion Lead Works v. Citizens' Ins. Co., 3 Fed. 197.

⁹⁹ Hawkins v. Georgia Nat. Bank, 61 Ga. 106. Compare Stevens v. Barringer, 13 Wend. (N. Y.) 639.

¹⁰⁰ Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224.

¹⁰¹ Gridley v. Harraden, 14 Mass. 496; Burnham v. Folsom, 5 N. H. 566.

¹⁰² Thorndike v. De Wolf, 6 Pick. 120; Locke v. Tippetts, 7 Mass.

ment only when the suit against the garnishee has not passed the stage in which he can set up the garnishment, by plea or otherwise therein, to prevent the rendering of judgment against him in respect of the property or debt garnished.¹⁰³

Garnishable at Any Stage of Proceedings.

§ 144. But the more generally accepted doctrine is that, for any liability of the garnishee to the defendant upon which the latter has brought suit, the garnishee may be charged upon a summons served upon him at any stage of the proceedings, either before judgment is recovered against him by the defendant,¹⁰⁴ or after such judgment is recovered,¹⁰⁵ and execution up-

149; *Foster v. Jones*, 15 Mass. 185; *Foster v. Dudley*, 30 N. H. 463; *Trombly v. Clark*, 13 Vt. 118; *Spicer v. Spicer*, 23 Vt. 678.

¹⁰³ *Howell v. Freeman*, 3 Mass. 121; *Kidd v. Shepherd*, 4 Mass. 238; *McCaffrey v. Moore*, 18 Pick. 492, 494; *Foster v. Dudley*, 30 N. H. 463; *Thayer v. Pratt*, 47 N. H. 470; *Trombly v. Clark*, 13 Vt. 118; *Wadsworth v. Clark*, 14 Vt. 139; *Holt v. Kirby*, 39 Me. 164; *Coppell v. Smith*, 4 Term R. (Eng.) 312.

The mere fact of issue being joined held not sufficient to prevent charging the defendant as garnishee. *Smith v. Barker*, 10 Me. 458. Contra, *Kidd v. Shepherd*, 4 Mass. 238.

¹⁰⁴ *Grosslight v. Crisup*, 58 Mich. 531, 25 N. W. 505; *Burt v. Wayne Circuit Judge*, 82 Mich. 251, 46 N. W. 380; *McCarty v. Emlin*, 2 Yeates (Pa.) 190, 2 Dall. 277; *Crabb v. Jones*, 2 Miles (Pa.) 130; *Sweeny v. Allen*, 1 Pa. St. 380; *Ulrich v. Hower*, 156 Pa. St. 414, 27 Atl. 243; *Trowbridge v. Means*, 5 Ark. 135, 39 Am. Dec. 368; *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Smith v. Carroll*, 17 R. I. 125, 21 Atl. 343; *Huff v. Mills*, 7 Yerg. (Tenn.) 42; *Penniman v. Smith*, 5 Lea (Tenn.) 130; *Hitt v. Lacey*, 3 Ala. 104, 36 Am. Dec. 440; *Thrasher v. Buckingham*, 40 Miss. 67; *Lieber v. St. Louis Agricultural & Mechanical Ass'n*, 36 Mo. 382; *McDonald v. Carney*, 8 Kan. 20.

¹⁰⁵ *Dodd v. Brott*, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; *Griffin v. Potter*, 27 Mich. 166; *Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46;

on it has been issued, and put into the hands of an officer to enforce payment of it;¹⁰⁶ provided always that the action in which he is summoned as garnishee

Gager v. Watson, 11 Conn. 168; Crabb v. Jones, 2 Miles (Pa.) 130; Fithian v. New York & E. Ry. Co., 31 Pa. St. 114; Belcher v. Grubb, 4 Har. (Del.) 461; Webster v. McDaniel, 2 Del. Ch. 297; Skipper v. Foster, 29 Ala. 330, 65 Am. Dec. 405; Calhoun v. Whittle, 56 Ala. 138; Dore v. Dougherty, 72 Cal. 232, 13 Pac. 622; Ochiltree v. Missouri, I. & N. Ry. Co., 49 Iowa, 150; Gray v. Henby, 1 Smedes & M. (Miss.) 598; O'Brien v. Liddell, 10 Smedes & M. (Miss.) 371; Minard v. Lawler, 26 Ill. 301; Keith v. Harris, 9 Kan. 386; Safford v. Maxwell, 23 La. Ann. 345. CONTRA: Prescott v. Parker, 4 Mass. 170; Shinn v. Zimmerman, 23 N. J. Law, 150, 55 Am. Dec. 260; Black v. Black, 32 N. J. Eq. 74; Trowbridge v. Means, 5 Ark. 135, 39 Am. Dec. 368; Tunstall v. Means, 5 Ark. 700; Norton v. Winter, 1 Or. 47, 62 Am. Dec. 297; Despin v. Crow, 14 Or. 404, 12 Pac. 806; Franklin v. Ward, 3 Mason (U. S.) 136, Fed. Cas. No. 5,055.

APPEAL AND DISMISSAL OF APPEAL AFTER GARNISHMENT: After a person against whom judgment has been rendered

¹⁰⁶ Griffin v. Potter, 27 Mich. 166; Belcher v. Grubb, 4 Har. (Del.) 461; Gager v. Watson, 11 Conn. 168; Blake v. Adams, 64 N. H. 86, 6 Atl. 482; Luton v. Hoehn, 72 Ill. 81; Ulrich v. Hower, 156 Pa. St. 414, 27 Atl. 243.

"No doubt, some inconvenience may arise in subjecting judgments upon which executions have already been issued to this process; but the general good should be regarded as the paramount interest, rather than the mere inconvenience of the debtor." Luton v. Hoehn, 72 Ill. 81; Gager v. Watson, 11 Conn. 168. "The trustees cannot equitably be put to the trouble and expense of protecting themselves against a double liability put upon them for the plaintiffs' benefit. It is for the plaintiffs to employ all procedure necessary for the trustees' safety." Blake v. Adams, 64 N. H. 86, 6 Atl. 482.

Held, that the attachment of part of a judgment by garnishment after execution thereon is issued and levied cannot avoid the title of a bona fide purchaser at the sale. Simmons v. Vandegrift, 1 N. J. Eq. 55.

Held, that money paid into court may be reached in garnishment against the plaintiff by summoning the clerk. Trotter v. Lehigh Zinc Co., 41 N. J. Eq. 229, 3 Atl. 95. See, also, ante, §§ 27-35.

is in the same court that rendered the judgment or has jurisdiction of the action against him, for, by the general supervisory control which all courts of general jurisdiction possess and may exercise over their judgments and process, they may in all cases afford the garnishee summary relief from vexation, and insure him ample protection from double liability.¹⁰⁷

Suit or Judgment and Garnishment must be before the Same Court.

§ 145. On the other hand, most of the courts hold that a judgment debtor, whether the judgment against

has appealed therefrom, he may be charged as garnishee for the demand involved in the suit. *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56.

And he cannot avoid liability by dismissing the appeal or compromising after the garnishment is served. *Bell v. Wood*, 87 Ky. 56, 7 S. W. 550.

DORMANT JUDGMENTS: After the year and a day within which execution may issue has expired, the judgment debtor may be charged as garnishee for the amount remaining unpaid on the judgment. *Sabin v. Cooper*, 15 Gray, 532.

WHEN PARTIES OF RECORD ARE NOT PARTIES IN INTEREST: Held, that one against whom judgment has been rendered for the use of the defendant, but in the name of another, cannot be charged. *Webster v. Steele*, 75 Ill. 544.

If a judgment is obtained in the name of one party, but belongs to another, of course the judgment debtor cannot be charged as garnishee of the nominal creditor. *Hodson v. McConnel*, 12 Ill. 170; *Ives v. Addison*, 39 Kan. 172, 17 Pac. 797; *Gunzberg v. Kent* Circuit Judge, 42 Mich. 591, 4 N. W. 308. See, also, ante, § 47.

VERDICT IN ACTIONS FOR DAMAGES: Suit brought and verdict recovered without judgment yet entered upon it will not render a demand garnishable which otherwise would not be. See post, § 152.

¹⁰⁷ *Sanchez v. Carriaga*, 31 Cal. 170; *Belcher v. Grubb*, 4 Har. (Del.) 461; 7 Am. & Eng. Enc. Law, 146.

"There is no principle of law better recognized than that which gives to courts of record power over the process of their courts. It is essential to the administration of justice, and it by no means depends

him was rendered in the same jurisdiction as that in which he is sought to be charged as garnishee,¹⁰⁸ or in another jurisdiction,¹⁰⁹ or one against whom suit has been begun in the same¹¹⁰ or another jurisdiction,¹¹¹

upon statutory enactment, but the power is coeval with the common-law courts, and such courts will recall their process, and quash the same, when it is shown that it would be illegal or inequitable to permit its further use and to allow it to be enforced." *Sandburg v. Papineau*, 81 Ill. 446. See, also, *Orient Ins. Co. v. Sloan*, 70 Wis. 611, 36 N. W. 388.

CLAIMANTS OF JUDGMENT: When it appears that the judgment garnished does not belong to the defendant, of which the garnishee had notice when he answered, the supreme court will not, by mandamus, compel the circuit judge to stay proceedings for collection of it. *Gunzberg v. Kent Circuit Judge*, 42 Mich. 591, 4 N. W. 308.

LACHES OF GARNISHEE: When a judgment debtor is charged as garnishee and fails to prove the defense till his property has been attached by garnishment on the judgment against him, and condemned, his laches may impose upon him a double liability. *Everdell v. Sheboygan & F. d. L. Ry. Co.*, 41 Wis. 403; *Wood v. Mann*, 125 Mass. 319.

¹⁰⁸ *Scott v. Robman*, 43 Neb. 618, 62 N. W. 46; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275, 5 N. W. 311; *Clodfelder v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; *Young v. Young*, 2 Hill (S. C.) 426; *Perkins v. Guy*, 2 Mont. 15; *Black v. Black*, 32 N. J. Eq. 74; *Sharpe v. Wharton*, 85 Ala. 225, 3 South. 787.

¹⁰⁹ *Burrell v. Letson*, 2 Speers (S. C.) 378; *American Bank v. Snow*, 9 R. I. 11, 98 Am. Dec. 364; *Shinn v. Zimmerman*, 23 N. J. Law, 150, 60 Am. Dec. 260; *Henry v. Gold Park Min. Co.*, 15 Fed. 649, 5 McCrary, 70; *Renier v. Hurlbut*, 81 Wis. 32, 50 N. W. 783; *Thomas v. Woolridge*, 2 Woods, C. C. 667, Fed. Cas. No. 13,918.

¹¹⁰ *Custer v. White*, 49 Mich. 262, 13 N. W. 583; *Noyes v. Foster*, 48 Mich. 273, 12 N. W. 221; *Miller v. Taylor*, 14 Tex. 538.

¹¹¹ *Wallace v. McConnell*, 13 Pet. 136, 150; *Mack v. Winslow*, 8 C. A. 134, 59 Fed. 316; *Greenwood v. Rector*, Hemp. 708, Fed. Cas. No. 5,792; *Campbell v. Emerson*, 2 McLean, 30, Fed. Cas. No. 2,357; *Wood v. Lake*, 13 Wis. 84; *Orient Ins. Co. v. Sloan*, 70 Wis. 611, 36 N. W. 388; *American Bank v. Rollins*, 99 Mass. 313; *Traders' Ins. Co. v. Chase* (Tex. Civ. App.) 31 S. W. 1103.

CONFLICT OF JURISDICTION: "The jurisdiction of the district

cannot, for the demand involved in such suit or judgment, be charged as garnishee in any court other than that in which the action is pending against him or the judgment against him was rendered, and that, if the defendant in a pending suit or a judgment debtor allows himself to be charged as garnishee in any suit before another court, the payment of the garnishment judgment will constitute no defense to the action against him.¹¹²

court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. * * * The priority of suit will determine the right. The rule must be reciprocal; and, where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, 'Qui prior est in tempore, potior est in jure,' must govern the case." *Wallace v. McConnell*, 13 Pet. 150, approved in *Rio Grande Ry. Co. v. Gomila*, 132 U. S. 485, 10 Sup. Ct. 155.

Execution will not be stayed on the ground that garnishment proceedings, commenced after the action in which the judgment was rendered, are pending in another state. *Shrewsbury v. Tufts* (W. Va.) 23 S. E. 692, 697.

¹¹² *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275, 5 N. W. 311; *Noyes v. Foster*, 48 Mich. 273, 12 N. W. 221; *Whipple v. Robins*, 97 Mass. 107, 93 Am. Dec. 64; *McRae v. Brown*, 45 Tex. 503.

NO GROUND FOR INTERPLEADER: When one who had been sued was summoned in another court as garnishee of the plaintiff in such suit, and defended on the ground that suit was pending against him, but was, nevertheless, charged, and thereafter his creditor recovered judgment in such first action, and executions were issued on both judgments, held, that the garnishee could not maintain interpleader, but must pay the judgment in the first action, and at his peril appeal from the judgment against him as garnishee. *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163.

How the Reason Limits the Rule.

§ 146. The principal reason given for these decisions is that to allow this to be done would be permitting one court to control the action of another of the same or superior authority and dignity, and, even in the same jurisdiction, would be an intolerable interference with the action of the other court. But the supreme courts of some of the states take the more practical view that courts are ordained and established as means of justice, and that, so far as the courts of the particular state are concerned, it is not the action of the court, but the action of the defendant, that is stayed, and not even that if he wishes to give the requisite bond to release the garnishee; and, therefore, that it makes no difference whether the suit or judgment against the garnishee is in the same court in which it is attempted to charge him as garnishee or in another, or whether the courts be of the same or different authority.¹¹³ This rule has been applied in some states although the judgment against the garnishee was rendered by a court of another jurisdiction.¹¹⁴

Payment under Garnishment in Another State.

§ 147. Whatever opinion may be entertained concerning the correctness of these last decisions, it is cer-

¹¹³ *McCarty v. Emlin*, 2 Yeates, 190, 2 Dall. 277; *Huff v. Mills*, 7 Yerg. (Tenn.) 42.

A debtor on a circuit court judgment may be charged as garnishee therefor in an action before a justice of the peace. *Jones v. St. Onge*, 67 Wis. 520, 534, 30 N. W. 927; *Luton v. Hoehn*, 72 Ill. 81; *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621. Contra, *Clodfelder v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 167.

¹¹⁴ *Jones v. New York & E. Ry. Co.*, 1 Grant (Pa.) 454; *Fuller v. Foote*, 56 Conn. 341, 15 Atl. 760; *Fithian v. New York & E. Ry. Co.*, 31 Pa. St. 114; *Knebelkamp v. Fogg*, 55 Ill. App. 503.

tain that when, by garnishment in another state, a judgment debtor has been compelled to pay his debt or a part of it to his creditor's creditor, good sense and plain common justice demand that he should not be required to pay again, and that the court which rendered the judgment should, on proper application and proof of the facts, restrain the judgment creditor who has had the benefit of one payment from extorting another.¹¹⁵

Rights of Action for Torts or for Damages Unliquidated.

Demands not Ascertainable by Computation.

§ 148. Are demands the amount of which cannot be ascertained by computation, but only by the verdict of a jury or in other similar manner, included in the terms of the statutes declaring what property and debts may be attached by garnishment? It is held that a right of action in favor of the defendant against the person summoned as garnishee for the failure of such person to perform his contract with the defendant cannot be attached by garnishment process, such claim being only for unliquidated damages, to be ascertained by a jury or in any other appropriate manner.¹¹⁶

¹¹⁵ Allen v. Watt, 79 Ill. 284. Compare Orient Ins. Co. v. Sloan, 70 Wis. 611, 36 N. W. 388; Lehigh Zinc & Iron Co. v. Trotter, 42 N. J. Eq. 678, 9 Atl. 691; The City of New Bedford, 20 Fed. 57.

¹¹⁶ Hugg v. Booth, 2 Ired. (N. C.) 282; Deaver v. Keith, 5 Ired. (N. C.) 374; Rand v. White Mt. Ry. Co., 40 N. H. 79; McKean v. Turner, 45 N. H. 203; Eastman v. Thayer, 60 N. H. 575; Leefe v. Walker, 18 La. 1; Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000. Contra, New Haven Steam Sawmill Co. v. Fowler, 28 Conn. 103, 107; Woodruff v. Fellowes, 35 Conn. 105; Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

Insurance before Adjustment of Loss.

§ 149. Upon the same reasoning, it has been held in some states that, after insured property is injured or destroyed, the liability of the insurance company on its policy is not garnishable till the loss is adjusted, because the amount is not liquidated.¹¹⁷

Other Illustrations.

§ 150. No one can be charged as garnishee by reason of any mere right of action against him in favor of the defendant for a tort committed.¹¹⁸ Thus, liability to the defendant in an action for deceit,¹¹⁹ or for wrongfully converting the defendant's property,¹²⁰ or for a libel published against the defendant,¹²¹ is not garnishable. Likewise, the liability of a sheriff or constable to the defendant for damages by reason of the failure of the officer to execute a process in favor of the defendant is not garnishable,¹²² much less is the liabil-

¹¹⁷ Bucklin v. Powell, 60 N. H. 119; McKean v. Turner, 45 N. H. 203; Katz v. Sorsby, 34 La. Ann. 588. Contra, Girard Fire Ins. Co. v. Field, 45 Pa. St. 129. 3 Grant, Cas. 329; Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.) 328, 96 Am. Dec. 239.

For decisions concerning liability on insurance policies before proof of loss, see ante, § 119.

¹¹⁸ Paul v. Paul, 10 N. H. 117; Despatch Line v. Bellamy Manuf'g Co., 12 N. H. 205; Foster v. Dudley, 30 N. H. 463; Holcomb v. Town of Winchester, 52 Conn. 447, 52 Am. Rep. 608; Rundlet v. Jordan, 3 Me. 47; St. Joseph Manuf'g Co. v. Miller, 69 Wis. 389, 34 N. W. 235.

¹¹⁹ Peet v. McDaniel, 27 La. Ann. 455.

¹²⁰ Selheimer v. Elder, 98 Pa. St. 154; Keyes v. Milwaukee & St. P. Ry. Co., 25 Wis. 691.

¹²¹ Detroit Post & Tribune Co. v. Reilly, 46 Mich. 459, 9 N. W. 492. Compare Hill v. Bowman, 35 Mich. 191.

¹²² Hemmenway v. Pratt, 23 Vt. 332; Lomerson v. Huffman, 25 N. J. Law, 625.

ity of his bondsmen for the same.¹²³ The statutory right to waive the tort and sue in assumpsit is personal, and cannot be claimed by garnishment.¹²⁴ None of the above causes of action are garnishable, for the reason that they are not included within the terms of the statute defining what may be attached by garnishment.

Usury—Breach of Warranty.

§ 151. It has also been held that a person who has taken money from the defendant usuriously,¹²⁵ or upon a deed which conveyed no title or rights, and therefore formed no consideration for the money paid,¹²⁶ cannot be charged as garnishee for such money, although the defendant might maintain assumpsit for it. But most of these decisions, if not all of them, were rendered in states and under statutes which require that the person summoned should be fiduciary depositary, or commissary of the defendant, or by express contract obligated to him in order to be chargeable as garnishee, which are not required by the statutes of most of the states, and, it is apprehended, would not obtain except by force of such statutes.¹²⁷

¹²³ Eddy v. Heath, 31 Mo. 141.

¹²⁴ Lewis v. Dubose, 29 Ala. 219.

¹²⁵ Boardman v. Roe, 13 Mass. 104; Barker v. Esty, 19 Vt. 131; Fish v. Field, Id. 141; Ransom v. Hays, 39 Mo. 445; Graham v. Moore, 7 B. Mon. (Ky.) 53. Compare Upton v. Johnston, 84 Wis. 8, 12, 54 N. W. 266; Church v. Simpson, 25 Iowa, 408.

¹²⁶ Getchell v. Chase, 37 N. H. 106. Contra, Allen v. Hazen, 26 Mich. 142; Williams v. Reed, 5 Pick. 480.

¹²⁷ Allen v. Hazen, 26 Mich. 142. Compare De Graff v. Thompson, 24 Minn. 452, and Connor v. Third Nat. Bank, 90 Mich. 328, 51 N. W. 523, with Staniels v. Raymond, 4 Cush. 314.

Effect of Verdict before Judgment—Appeals.

§ 152. If the claim of the defendant against the person summoned as garnishee is not of a garnishable nature, it will become so only on judgment being entered upon it in favor of the defendant. A verdict merely, without judgment entered, will not be sufficient.¹²⁸ When the claim becomes garnishable by the entry of judgment against the garnishee upon it before he is summoned, an appeal without entering a supersedeas will not defeat the garnishment if the judgment is affirmed on the appeal.¹²⁹ An appeal does not destroy the finality of the judgment, and keep the demand alive as it existed before the judgment was entered; and therefore the garnishee can be charged on a garnishment served while the appeal is pending, provided the judgment of the lower court is affirmed by the appellate court.¹³⁰

¹²⁸ *Detroit Post & Tribune Co. v. Reilly*, 46 Mich. 459, 9 N. W. 492; *Thayer v. Southwick*, 8 Gray, 229; *Gamble v. Central Railroad & Banking Co.*, 80 Ga. 595, 7 S. E. 315; *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. 927; *Kellogg v. Schuyler*, 2 Denio (N. Y.) 73.

The entry of a default, and noticing the case for assessment of damages, does not render a liability for a tort garnishable. *Holcomb v. Town of Winchester*, 52 Conn. 447, 52 Am. Rep. 608.

¹²⁹ *Phillips v. Germon*, 43 Iowa, 101.

¹³⁰ *Kreisle v. Campbell* (Tex. Sup.) 33 S. W. 852, disapproving an opinion to the contrary by the court of civil appeals in the same case, reported in 32 S. W. 581.

Equitable Claims.

Whether Garnishment is a Legal or an Equitable Proceeding.

§ 153. Sometimes garnishment is considered as a proceeding at law,¹³¹ suited only to the trial of legal controversies.¹³² At other times it has been looked upon as a proceeding of an equitable character,¹³³ in which equitable issues may be presented and tried as well as in a court of chancery;¹³⁴ while in some states

¹³¹ Harrell v. Whitman, 19 Ala. 138; Teague v. Le Grand, 85 Ala. 493, 5 South. 287; Craft v. Summersell, 93 Ala. 430, 9 South. 593; Webster v. Steele, 75 Ill. 544; May v. Baker, 15 Ill. 89; Knowles v. Herbert, 11 Or. 54, 240, 4 Pac. 126; Williams v. Gallick, 11 Or. 337, 3 Pac. 469; Case v. Noyes, 16 Or. 329, 19 Pac. 104; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614; Cross v. Brown (R. I.) 33 Atl. 147, 157.

¹³² Knowles v. Herbert, 11 Or. 54, 240, 4 Pac. 126; Schneider v. Lee (Or.) 17 Pac. 269; Lockett v. Rumbough, 40 Fed. 523; Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11,133; dissenting opinion in Cummings v. Fearey, 44 Mich. 42, 6 N. W. 98.

¹³³ In re Glen Iron Works, 17 Fed. 324; Hudson v. McConnel, 12 Ill. 170; Carter v. Webster Winnipiseogee Paper Co., 65 N. H. 17, 17 Atl. 978; Stedman v. Vickery, 42 Me. 132; Delaney v. Hartwig (Wis.) 64 N. W. 1035; First Nat. Bank v. Knowles, 67 Wis. 373, 389, 28 N. W. 225; Kennedy v. McLellan, 76 Mich. 598, 604, 43 N. W. 641.

¹³⁴ Shaver Wagon & Carriage Co. v. Halsted, 78 Iowa, 730, 43 N. W. 623; La Crosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153; First Nat. Bank v. Knowles, 67 Wis. 373, 389, 28 N. W. 225; Page v. Smith, 25 Me. 256; Whitney-Holmes Organ Co. v. Pettitt, 34 Mo. App. 536. Contra, Sears v. Thompson, 72 Iowa, 61, 33 N. W. 364.

The trial of the bona fides of a conveyance to the garnishee by the defendant in an attempt to charge the former therefor in a suit against the latter has been held not to involve an equitable issue, and therefore it was held error to transfer the cause to the equity side of the court for trial. Kelley v. Andrews (Iowa) 62 N. W. 853. See, also, ante, § 75.

It is not denied that there are cases subject to equitable accounting. Des Moines Sav. Bank v. Colfax Hotel Co., 88 Iowa, 4, 55 N. W. 67.

courts which try only chancery causes are invested with jurisdiction in garnishment by statute. From the opportunity it affords for obtaining discovery, it is generally admitted to be an appropriate proceeding in which to try the bona fides of an alleged assignment, and apply the assigned property to the use of creditors of the real owner;¹³⁵ and in determining the rights of plaintiff, garnishee, and claimant, respectively, in cases in which a claimant intervenes or is interpleaded, the jurisdiction exercised and the procedure adopted certainly conform more nearly to a suit in chancery than to an action at law.¹³⁶ The effect of abolishing the distinction between courts of law and equity under the codes adopted in various states has been discussed in this connection, but nothing seems to have been decided further than that inferior courts are not thereby vested with equity powers which they did not previously possess.¹³⁷ It has been held that, if statutory garnishment can ever be employed to enforce a decree of a court of chancery in a state where the division of jurisdiction between courts of law and courts of chancery is still maintained, it can only be done by proceedings on the law side of the court.¹³⁸

Equitable Rights not Garnishable under Proceeding at Law.

§ 154. In those states in which garnishment is held to be a purely legal proceeding, and perhaps in some

¹³⁵ See ante, § 75.

¹³⁶ *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908.

¹³⁷ *Hassie v. God Is With Us Congregation*, 35 Cal. 378. Compare *Knowles v. Herbert*, 11 Or. 54, 240, 4 Pac. 126; *Universal Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 891; *Woodruff v. McDonald Furniture Co.* (Ga.) 23 S. E. 195.

¹³⁸ *U. S. v. Swan*, 13 C. C. A. 77, 65 Fed. 647.

others, the garnishee can be charged only for such obligations as would enable the defendant to maintain an action of debt, or *indebitatus assumpsit*,¹³⁹ in his own name;¹⁴⁰ and merely equitable claims cannot be attached by garnishment.¹⁴¹ Upon this principle it has been held that when the garnishee owes the defendant, if at all, only in respect to an unliquidated partnership account, the amount could only be ascertained by an accounting in equity, and therefore cannot be attached by garnishment.¹⁴² When garnish-

¹³⁹ *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Redondo Beach Co. v. Brewer*, 101 Cal. 322, 35 Pac. 896; *Webster v. Steele*, 75 Ill. 544; *Lundie v. Bradford*, 26 Ala. 512; *Teague v. Le Grand*, 85 Ala. 493, 5 South. 287.

¹⁴⁰ *Hoyt v. Swift*, 13 Vt. 133, 37 Am. Dec. 586; *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100; *Webster v. Steele*, 75 Ill. 544; *Perea v. Colorado Nat. Bank (N. M.)* 27 Pac. 322.

¹⁴¹ *May v. Baker*, 15 Ill. 89; *Webster v. Steele*, 75 Ill. 544; *Hoyt v. Swift*, 13 Vt. 133, 37 Am. Dec. 586; *Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86; *Chase v. Thompson*, 153 Mass. 14, 26 N. E. 137; *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100; *Perry v. Thornton*, 7 R. I. 15; *Clark v. Farnum*, Id. 174; *Smith v. Milletts*, 11 R. I. 528; *Harrell v. Whitman*, 19 Ala. 138; *Harris v. Miller*, 71 Ala. 26; *Gibson v. National Park Bank*, 98 N. Y. 87, 97; *Williams v. Gage*, 49 Miss. 777; *Osborne v. Edwards*, 11 N. J. Eq. 73; *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Redondo Beach Co. v. Brewer*, 101 Cal. 322, 35 Pac. 896; *Swann v. Summers*, 19 W. Va. 115; *Garland v. Sperling (N. M.)* 30 Pac. 925.

EQUITABLE REMEDIES ACQUIRED BY GARNISHMENT:
"It operates only on the legal rights of the defendant; such rights as, by an action at law, he could in his own name enforce. * * * But it is quite an error to suppose that, where a creditor succeeds in condemning legal assets, he is confined to legal remedies to render them available. He may pursue whatever of equitable remedies any judgment creditor may pursue, and, if there is an equity inhering in the assets, that equity he may enforce." *White v. Simpson (Ala.)* 18 South. 151. See, also, ante, § 127.

¹⁴² *Farwell v. Chambers*, 62 Mich. 316, 321, 28 N. W. 859; *Burn-*
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ment is conducted as an equitable proceeding, no reason appears why equitable rights may not thereby be attached, as well as legal debts.¹⁴³

Debts and Property Belonging to Part of the Defendants.

§ 155. It is everywhere recognized that, upon a joint judgment against several persons, the individual property of any one or more of them may be taken in execution; for otherwise joint judgments would in many cases be uncollectible, and in most cases worth less than a judgment against any one of the defendants. For the same reason it has generally been held that a garnishee may be charged for a debt or property belonging to any one or more of the defendants.¹⁴⁴ These decisions have been departed from by the supreme court of Michigan, for the misapplied and unsatisfactory reason that "these proceedings are purely statutory, and cannot be extended by construction."¹⁴⁵

ham v. Hopkinson, 17 N. H. 259; Treadwell v. Brown, 41 N. H. 12, 43 N. H. 290; Ives v. Vanscoyoc, 81 Ill. 120; Rycn v. Wynkoop, 148 Pa. St. 188, 23 Atl. 1002; Birtwhistle v. Woodward, 95 Mo. 113, 7 S. W. 465. Contra, Cox v. Russell, 44 Iowa, 556.

¹⁴³ Candee v. Penniman, 32 Conn. 228; Cox v. Russell, 44 Iowa, 556; Burnham v. Doolittle, 14 Neb. 214, 15 N. W. 606; Root v. Davis, 51 Ohio St. 29, 36 N. E. 669. Compare Brande v. Bond, 63 Wis. 140, 23 N. W. 101.

¹⁴⁴ Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078; Thompson v. Taylor, 13 Me. 420; Stevens v. Perry, 113 Mass. 380; Stone v. Dean, 5 N. H. 502; Caignett v. Gilband, 2 Yeates (Pa.) 35; Locket v. Child, 11 Ala. 640.

¹⁴⁵ Ford v. Detroit Dry-Dock Co., 50 Mich. 358, 15 N. W. 509; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859. See, also, Brumwell v. Stebbins, 83 Iowa, 425, 49 N. W. 1020.

The statutes have been amended since these decisions were rendered,

Debts and Property Belonging to the Defendant and Others Jointly.

Individual Partners Have No Interest in Debts Due Partnership.

§ 156. "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe the firm. Consequently, all the debts due from the joint fund must be first discharged before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor of one of the partners cannot claim any interest but what belongs to his debtor."¹⁴⁶ "Until such settlement, it would, of course, be impossible to tell what the interest of one of the partners in the firm property was. The creditors of the firm, upon well-settled principles, would first have to be paid out of the partnership property, and the accounts between the partners themselves would have to be adjusted, before the interest of one of the partners could be ascertained. The partnership effects might be wholly exhausted in the payment of the partnership liabilities. The partnership might even be insolvent. On settlement of

so that now the garnishee may be charged for debts or property belonging to any or either of the defendants. *Meigs v. Weller*, 90 Mich. 629, 51 N. W. 681. See, also, *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500.

¹⁴⁶ The above is quoted from the opinion of Chief Justice Parsons in *Pierce v. Jackson*, 6 Mass. 242.

Creditors of A., B. & C., copartners, garnished debtors of A. & B., copartners, and creditors of the last firm intervened as claimants. Held, that judgment was rightly given in favor of the claimants. *Brumwell v. Stebbins*, 83 Iowa, 425, 49 N. W. 1020.

the partnership matters, the partner whose interest was attached might turn out to be a debtor of the firm, and entitled to nothing.”¹⁴⁷

Debts Due Partnerships not Garnishable in Suits against Individual Partners.

§ 157. In view of these considerations, and others which might be suggested, it has generally been held that, in actions against any person for his individual debt, garnishees cannot be charged for any part of the indebtedness they might owe to any partnership of which the defendant is a member, so long as the affairs of the partnership have not been finally settled;¹⁴⁸

¹⁴⁷ Brande v. Bond, 63 Wis. 140, 23 N. W. 101.

¹⁴⁸ Fisk v. Herrick, 6 Mass. 271; Upham v. Naylor, 9 Mass. 490; Hawes v. Waltham, 18 Pick. 451; Bulfinch v. Winchenbach, 3 Allen, 161; Stillings v. Young, 161 Mass. 287, 37 N. E. 175; Church v. Knox, 2 Conn. 514; Towne v. Leach, 32 Vt. 747; Bartlett v. Woodward, 46 Vt. 100; Markham v. Gehan, 42 Mich. 74, 3 N. W. 262; Dawson v. Iron Range & H. B. Ry. Co., 97 Mich. 33, 56 N. W. 106; Singer v. Townsend, 53 Wis. 126, 226, 10 N. W. 365; Myers v. Smith, 29 Ohio St. 120; Lyndon v. Gorham, 1 Gall. 367, Fed. Cas. No. 8,640; Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; Sweet v. Reed, 12 R. I. 121; Brown v. Collins (R. I.) 27 Atl. 329; Barry v. Fisher, 39 How. Prac. 521; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476; Thomas v. Lusk, 13 La. Ann. 277; Ripley v. People's Sav. Bank, 18 Ill. App. 430; Johnson v. King, 6 Humph. (Tenn.) 233; Sheedy v. Second Nat. Bank, 62 Mo. 17; Pullis v. Fox, 37 Mo. App. 592; Trickett v. Moore, 34 Kan. 755, 10 Pac. 147.

CLIPPINGS FROM DECISIONS: “It appears beyond question that the principal defendants, together with the plaintiff and garnishee defendant, are a copartnership, and that the indebtedness attempted to be garnished is going to that firm; and whether there is any such indebtedness on the part of the garnishee defendant to the principal defendants, or to either of them, cannot be ascertained with any certainty until there has been an accounting and settlement of the firm business, and an adjustment of the account of the garnishee defendant with the firm, and such an accounting cannot be had at

and it is immaterial that the partnership exists only for illegal purposes.¹⁴⁹

law." *Farwell v. Chambers*, 62 Mich. 316, 28 N. W. 859. Compare *Birtwhistle v. Woodward*, 95 Mo. 113, 7 S. W. 465.

"Such an application of the trustee process to the exercise of chancery powers for the settlement of partnerships and other joint adventures would be impracticable, full of mischiefs, and could never have been intended by the legislature. A separate creditor of one partner or joint contractor could at any time, by the trustee process, compel the application of partnership funds to the payment of the separate debt of the partner (which the partner himself could not do without fraud), or else force the partnership into a liquidation and settlement of their affairs, in order to ascertain the several interests of one partner. This would be unjust and intolerable." *Towne v. Leach*, 32 Vt. 747, 756.

"It is well known that in partnerships the effects do not usually belong to the partners equally, in proportion to their number. Sometimes one will advance the capital, which is to be returned, while the other is to transact the business; and the profits, only, are to be shared between them. The effects might be wanted, not only to pay the partnership debts, but, on a settlement of the accounts, the partner in the execution might be a debtor to the partnership. If, then, we consider them as tenants in common, and permit a creditor to sell one-half to pay the separate debt of one partner, we shall, in many instances, suffer the property of one man to be taken to pay the debts of another, and give to a separate creditor of a partner a right over the effects of a partnership, which such partner could not exercise; and, if the purchaser should be allowed to take possession of the effects, he might dissolve or destroy the partnership. The only mode of doing justice is to sell the interest of the partner, who is the debtor in the execution; and, though this may be uncertain and difficult to come at, yet this can be no reason why a rule manifestly unjust should be adopted." *Church v. Knox*, 2 Conn. 514.

A DEBTOR OF ONE FIRM CANNOT BE HELD AS GARNISHEE OF ANOTHER, though there be a member common to both firms. To allow this, it must be decided that the funds of one partnership may be applied to the payment of the debts of another. *Lynndon v. Gorham*, 1 Gall. 367, Fed. Cas. No. 8,640; *Field v. Malone*, 102 Ind. 251, 1 N. E. 507; *Ullman v. Eggert*, 30 Ill. App. 310.

¹⁴⁹ *Crescent Ins. Co. v. Baer*, 23 Fla. 50, 1 South. 318.

Corporeal Property of Partnership Garnishable in Such Suits.

§ 158. Applying the principle that the interest of any member of a partnership may be levied upon or attached and sold to satisfy his individual liability, such levy or attachment being subject to all the rights of the other partners and the creditors of the firm,¹⁵⁰ some of the courts, and in the very same cases which decide and declare the doctrine above stated, have held that garnishees may be charged for the interest of the defendant in tangible property in the garnishee's possession belonging to a partnership of which the defendant is a member, for this the garnishee may turn out in discharge of his liability, and it may then be sold in the same manner as if originally taken upon execution.¹⁵¹

Partnership Credits or Property Garnishable Indiscriminately in Such Suits.

§ 159. Some courts hold that there is nothing in the nature of a debt or chose in action belonging to a partnership which, so far as the question under discussion is concerned, should distinguish it from tangible personal property of the firm, and that during the life of the firm of which the defendant is a member the garnishee may be charged for any debt he owes the firm to the extent of the defendant's interest in it; the burden being on the plaintiff to show what that interest would be after all firm accounts are paid.¹⁵²

¹⁵⁰ *Atkins v. Sexton*, 77 N. Y. 195; *Snell v. Crowe*, 3 Utah, 26, 5 Pac. 522. But see *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714.

¹⁵¹ *Winston v. Ewing*, 1 Ala. 129; *Myers v. Smith*, 29 Ohio St. 120; *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147. See, also, *Church v. Knox*, 2 Conn. 514.

¹⁵² *Robinson v. Tevis*, 38 Cal. 612; *Day v. McQuillan*, 13 Minn. 205

Interest of Partner after Dissolution and Accounting.

§ 160. If the partnership has been dissolved, and the affairs settled, so that it is certain just how much is due the defendant after the partnership debts have been paid, the reason for the rule stated at the first

(Gil. 192); *Whitney v. Munroe*, 19 Me. 42, 36 Am. Dec. 732; *Thompson v. Lewis*, 34 Me. 167; *Smith v. Cahoon*, 37 Me. 281; *Burnell v. Weld*, 59 Me. 423; *Parker v. Wright*, 66 Me. 392; *Hill v. Beach*, 12 N. J. Eq. 31, 33; *Brown v. Bissett*, 21 N. J. Law, 46; *Schatzill v. Bolton*, 2 McCord (S. C.) 478, 3 McCord (S. C.) 33, and 13 Am. Rep. 748; opinion of Hosmer, J., in *Church v. Knox*, 2 Conn. 522; *McCarty v. Emulen*, 2 Dall. 277, 2 Yeates (Pa.) 190; *Knerr v. Hoffman*, 65 Pa. St. 126. But see *Ryon v. Wynkoop*, 148 Pa. St. 188, 23 Atl. 1002.

PARTNERSHIP ACCOUNTS MUST BE FIRST PAID: When a bank received a check drawn by one member of an insolvent firm upon the firm account in payment of his individual debt to the bank, and thereafter the bank was garnished in a suit against the firm, held, that it should be charged for the money named in the check, for it could not thus misapply the funds of the firm to the injury of its creditors. *Johnson v. Hersey*, 70 Me. 74, 73 Me. 291.

ALL INTERESTED PERSONS MUST BE MADE PARTIES: "It is settled law in this state that when one of the members of a firm is sued for his individual debt, and a debtor of the firm is trustee, notice of the fact must be given to the other members of the firm, or a judgment charging the trustee will not be binding upon them. Whether or not the trustee shall be charged, and, if so, for how much, are questions in which they are interested, and in the decision of which they have a right to be heard; and, if they do not voluntarily appear and become parties to the suit, notice of its pendency must be given to them, or a judgment charging the trustee will not be binding upon them. All the assets of the firm, including its credits, may be needed for the payment of the firm's debts; and, if so, no portion of them can be applied to the payment of the debt of one of its members. It is only his individual share, after all the affairs of the firm have been fully settled, that can be taken on a trustee process, and applied to the payment of his individual debt." *Henderson v. Cashman*, 85 Me. 437, 27 Atl. 344.

Under a statute declaring that, under attachment upon the firm property in an action against a member of the firm, the plaintiff

of this title ceases, and the rule should no longer exist.¹⁵³ When a partnership has been dissolved by the death of one of the partners, debts due the late partnership are held garnishable in suits against the survivor.¹⁵⁴

Suits against Individual for Firm Debt.

§ 161. So, where the debt on which the judgment in the principal suit was rendered was a debt of the partnership, but one of the partners was discharged on a plea of infancy, neither the rule nor its reason applies, and the garnishee should be charged for the debt he owed the firm;¹⁵⁵ and the same is true of cases in which the garnishee discloses liability to all the defendants in the main action jointly, in which action only part of such defendants were served with the original process.¹⁵⁶

acquires simply a lien on the interest of the defendant therein, he acquires no greater interest by garnishment. "Where, under the process of garnishment, all parties are before the court, and the proper issues are joined for the determination of the partner's interest, it may not be necessary to resort to a separate action in equity to determine the partner's interest." *Cox v. Russell*, 44 Iowa, 556.

¹⁵³ *Harlan v. Moriarty*, 2 G. Greene (Iowa) 486; *Birtwhistle v. Woodward*, 95 Mo. 113, 7 S. W. 465.

Held, that money belonging to a late firm of three may be garnished in a suit against a new firm composed of two of the former and another person. *Burnell v. Weld*, 59 Me. 423.

¹⁵⁴ *Berry v. Harris*, 22 Md. 30; *Knox v. Schepler*, 2 Hill (S. C.) 595.

¹⁵⁵ *Bethel v. Judge of Superior Court*, 57 Mich. 379, 24 N. W. 112. Compare *Sutro v. Bigelow*, 31 Wis. 527; *Allison v. Chicago, B. & Q. Ry. Co.*, 76 Iowa, 209, 40 N. W. 813.

¹⁵⁶ *Thomas v. Brown*, 67 Md. 512, 10 Atl. 713.

Suit being brought against one partner on a partnership demand, and debtors of the partnership being garnished, held, that the garnishment was properly sustained, the other partner being afterwards

Debts Due Joint Creditors not Partners.

§ 162. The objections urged against charging garnishees for debts they may owe to partnerships of which the defendant is a member do not apply with equal force when the persons owning the debt are not partners, but only joint owners. Some of the decisions distinguish such cases, and, while admitting that the garnishee could not be charged for any debt he might owe a partnership of which the defendant is a member, yet hold that he may be charged for the interest of the defendant in any debt owing by the garnishee to him and another jointly, they not being partners.¹⁵⁷

joined in the original suit by amendment. *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630.

¹⁵⁷ *Whitney v. Munroe*, 19 Me. 42, 36 Am. Dec. 732; *Miller v. Richardson*, 1 Mo. 310; *Thorndike v. De Wolf*, 6 Pick. 120; *Simmons v. Carmichael* (Tex. Civ. App.) 28 S. W. 690; *Bolter v. Girtton* (Iowa) 61 N. W. 919. Compare *Hawes v. Waltham*, 18 Pick. 451; *Brown v. Collins* (R. I.) 27 Atl. 329; *French v. Rogers*, 16 N. H. 177.

"No provision is made by this statute to reach a promissory note, or other promise for the payment of money which belongs jointly to the defendant and a third person. It was held in *Markham v. Gehan*, 42 Mich. 74, 3 N. W. 262, that the process of garnishment would not reach a demand due in part only to the principal defendant. * * * The proceeding in garnishment must be governed by equitable principles, and it never can be done in this proceeding or any other until all persons, whether natural or artificial, who have substantial interests in the property, have been in some manner properly brought before the court." *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. 643.

"As our statutes now stand, the court has no power to remedy these inconveniences, nor could we prevent this process from injuriously affecting Colton if we were to apply it to this debt. Legislation might regulate it. The courts of New Hampshire have so ruled. *Hanson v. Davis*, 19 N. H. 133. The plaintiff claims that the decision in *Bartlett v. Wood*, 32 Vt. 372, that the undivided half of a debtor's interest in a chattel in the hands of the trustee may be taken on trustee process

Choses in Action in the Garnishee's Possession.*Not Liable to Common-Law Process.*

§ 163. At common law, choses in action were not subject to seizure and sale on execution, and this rule still prevails except where changed by statute.¹⁵⁸ Considering this fact and the fact that no money judgment can be rendered against the garnishee except when he is charged as debtor,¹⁵⁹ and that, when he is charged because of his possessing defendant's property, he discharges himself by surrendering the property to the sheriff, who then proceeds and sells it in the same manner as if taken on execution, it would seem to follow of necessity that, where the common-law rule above stated prevails, the garnishee could never be charged on account of any choses in action in his hands.¹⁶⁰

involves the principle for which he here contends. We think not. There is an obvious difference between the rights of a joint owner of a chose in action and a chattel in the possession of another. * * * The trustee of the chattel has only to deliver it to the sheriff, and he sells the undivided half." *Fairchild v. Lampson*, 37 Vt. 407, 410.

The husband's interest in the undivided proceeds of land owned by husband and wife, and held by entirety, can be garnished in a suit against the husband. *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. 909, reversing, on rehearing, same case reported in 27 N. E. 873. Money due the defendant and another for cheese sold with directions to pay a moiety to each of the joint owners is garnishable. *Piper v. Hanley*, 48 Vt. 479.

¹⁵⁸ *Freem. Ex'ns*, § 112.

¹⁵⁹ *Wilson v. Albright*, 2 G. Greene (Iowa) 125. See, also, post, § 393.

¹⁶⁰ *Sargeant v. Leland*, 2 Vt. 277; *Fitch v. Waite*, 5 Conn. 117; *Grosvenor v. Farmers' & Mechanics' Bank*, 13 Conn. 104; *Price v. Brady*, 21 Tex. 614.

Not within Terms of Garnishment Statutes.

§ 164. But, when the question was presented to the courts for decision in states where this rule still prevailed, they took occasion to go further, and declare that choses in action did not come within the terms of the section of the statute declaring what property in the garnishee's hands would render him chargeable. Thus, it was held that choses in action are not "chattels,"¹⁶¹ and are not included in the terms "goods, effects, or credits."¹⁶² Following these and similar cases, we find a long array of decisions holding that a garnishee can never be charged on account of promissory notes or other choses in action in his possession belonging to the defendant.¹⁶³ These decisions have no application to cases in which the debtor is in posses-

¹⁶¹ *Maine Fire & Marine Ins. Co. v. Weeks*, 7 Mass. 438.

"At common law, stock in a corporation was not subject to levy or attachment. The share of stock was neither a chattel nor a chose in action." *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348, 351.

¹⁶² *Perry v. Coates*, 9 Mass. 537.

"THE WORD 'CREDITS' is of ambiguous meaning, and therefore requires exposition. It might mean debts due from the trustee himself to the principal, or debts due other persons, the evidence of which was deposited with or intrusted to the trustee. It has been determined to mean the former only, and this because, on examination of the provisions of the law, it was manifest such was the intention of the legislature." *Lupton v. Cutter*, 8 Pick. 298. *Contra*, *Deering v. Richardson-Kimball Co. (Cal.)* 41 Pac. 801.

¹⁶³ *Dickinson v. Strong*, 4 Pick. 57; *Andrews v. Ludlow*, 5 Pick. 28; *Lupton v. Cutter*, 8 Pick. 298; *Gore v. Clisby*, Id. 555; *Guild v. Holbrook*, 11 Pick. 101; *Hopkins v. Ray*, 1 Metc. (Mass.) 79; *Meacham v. McCorbitt*, 2 Metc. (Mass.) 352; *Lane v. Felt*, 7 Gray, 491; *Hancock v. Colyer*, 99 Mass. 187, 96 Am. Dec. 730; *Knight v. Bowley*, 117 Mass. 551; *Moors v. Goddard*, 147 Mass. 287, 17 N. E. 532; *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250; *Tweedy v. Bogart*, 56 Conn. 319, 15 Atl. 374; *New Hampshire I. F. Co. v. Platt*, 5 N. H. 193; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359; *Howland v. Spencer*, 14

sion of the written evidence of his debt, for then he may be charged as debtor, regardless of the writing.¹⁶⁴

When Subject to Execution are Garnishable.

§ 165. The reasons given in these decisions do not disclose any objections to charging the garnishee for choses in action in his possession in states where they may be taken and sold under execution. Although the courts, in the decisions above referred to, make these statements arguendo, it is evident that the true reason for the decisions is the fact that, even if carried to judgment against the garnishee, the proceedings would be futile, because choses in action could not be sold by the sheriff when surrendered. In those states in which, by statute, choses in action may be sold un-

N. H. 530; Scofield v. White, 29 Vt. 330; Van Amee v. Jackson, 35 Vt. 173; Fuller v. Jewett, 37 Vt. 473; Jones v. Norris, 2 Ala. 526; Marston v. Carr, 16 Ala. 325; Pearce v. Shorter, 50 Ala. 318; Levi-sohn v. Waganer, 76 Ala. 412; Craft v. Sommersell, 93 Ala. 430, 9 South. 593; Raignel v. McConnell, 25 Pa. St. 362; Allen v. Erie City Bank, 57 Pa. St. 129; Taylor v. Huey, 166 Pa. St. 518, 31 Atl. 199; Rundlet v. Jordan, 3 Me. 47; Copeland v. Weld, 8 Me. 411; Clark v. Viles, 32 Me. 32; Wilson v. Wood, 34 Me. 123; Smith v. Kennebec & P. Ry. Co., 45 Me. 547; Skowhegan Bank v. Farrar, 46 Me. 293; Bowker v. Hill, 60 Me. 172; Price v. Brady, 21 Tex. 614; Taylor v. Gillian, 23 Tex. 508; Tirrell v. Canady, 25 Tex. 455; Ellison v. Tuttle, 26 Tex. 283; Carter v. Bush, 79 Tex. 29, 15 S. W. 167; Moore v. Pillow, 3 Humph. (Tenn.) 448; Hanaford v. Hawkins (R. I.) 28 Atl. 605; Morton v. Grafflin, 68 Md. 545, 15 Atl. 298.

CHANCERY GARNISHMENT: In such cases all the benefits of a garnishment may, on proper showing, be obtained by bill in equity. McCann v. Randall, 147 Mass. 81, 17 N. E. 75.

BANK BILLS CURRENT AS MONEY may be attached by garnishing the holder, Lovejoy v. Lee, 35 Vt. 430; Morrill v. Brown, 15 Pick. 173; not so when they have ceased to be current by being dishonored, Perry v. Coates, 9 Mass. 537. Compare Wildes v. Nahant Bank, 20 Pick. 352.

¹⁶⁴ Moursund v. Priess, 84 Tex. 554, 19 S. W. 775. See ante, § 130.

der execution, the above decisions have been very generally disregarded, and garnishees charged for choses in action in their possession belonging to the defendant;¹⁶⁵ and the garnishment statutes in many of these

¹⁶⁵ *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113; *Stevens v. Dillman*, 86 Ill. 233; *Puget Sound Nat. Bank v. Mather* (Minn.) 62 N. W. 396; *Edwards v. Beugnot*, 7 Cal. 162; *Deering v. Richardson-Kimball Co.* (Cal.) 41 Pac. 801; *Gillett v. Cooper*, 48 Kan. 632, 30 Pac. 13; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Coombs v. Davis*, 2 Wash. T. 466, 7 Pac. 860.

CLIPPINGS FROM DECISIONS: "The only other point raised on the argument which it is necessary to examine is whether these bonds are the subject of the garnishee process. Our statute is broad, and covers 'property, money, and effects.' That these bonds were 'property,' in the ordinary signification of the term, we think, cannot be doubted. That the railroad company considered them as property, and valuable, too, is evident from the fact that it proposed to turn them out in satisfaction of its debts, at ninety-five cents on the dollar. * * * In the New England States, where substantially the same remedy exists under different names, there have been decisions holding that notes and choses in action were not the subject of the trustee process (8 Pick. 298; 9 Mass. 537); but their statutes will be found to be essentially different from our own, and much more limited in terms, confining the process to goods, moneys, and effects. So, also, by their statutes, is property that may be levied on by writ of execution more limited in kind than is subject to that process here. * * * These bonds are evidences of debt, and are clearly the subject of attachment, whenever the officer can find them so as to take them into his possession; and, there being nothing in the nature of the property itself which exempts it from process of execution or attachment, no valid reason can be given why it should not be reached by this process, which is, in effect, but another form of attachment, and intended to reach a class of cases in which the ordinary writ is of no avail. * * * In short, it is not credible that the legislature intended to place the large amounts of property of this class that are held in every community beyond the reach of creditors, and exempt it from payment of debts; and yet such would be the practical effect of giving the construction to the statute contended for by the counsel for the respondent." *Banning v. Sibley*, 3 Minn. 389 (Gil. 282, 298).

"The counsel for the garnishees claim that, even under the attach-

states contain sections providing that garnishees may be charged therefor.¹⁶⁶

Immaterial to Whom Payable.

§ 166. If the chose in action belongs to the defendant, the fact that it is payable only upon his order,¹⁶⁷ or upon the order of a third person,¹⁶⁸ constitutes no objection to charging the garnishee therefor.

ment law, it cannot be presumed the legislature intended to abrogate the common-law rule, and subject a chose in action to levy and sale on execution. However this may be, it is very certain that the officer might seize the draft on the attachment; and, if he could not sell it on execution or under an order of court, he had ample authority to proceed and collect it. This is very obvious from the provisions above referred to. Upon this point we were referred to some decisions which hold that a bond, note, or other chose in action is not liable to attachment; but we cannot adopt them as correct expositions of the law, on account of the dissimilarity between the statutes under which these decisions were made and our own upon this subject. Our statute renders liable to attachment and to garnishment on execution 'the property, credits and effects' of the debtor in the hands or possession of a third person; and this language is sufficiently broad and comprehensive to include a draft or other chose in action." *Storm v. Cotzhausen*, 38 Wis. 139. Approved and affirmed in *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 397, 43 N. W. 153.

STOCK IN A FOREIGN CORPORATION cannot be attached by summoning as garnishee the person having possession of the stock certificates. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 20 S. W. 690; *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, and 35 N. E. 568; *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341; *Tweedy v. Bogurt*, 56 Conn. 419, 15 Atl. 374. CONTRA, *Puget Sound Nat. Bank v. Mather* (Minn.) 62 N. W. 396; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 212. See, also, ante, § 109.

¹⁶⁶ *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348; *Leighton v. Heagerty*, 21 Minn. 42; *Bank of State of Missouri v. Bredow*, 31 Mo. 523; *Fling v. Goodall*, 40 N. H. 208.

¹⁶⁷ *Storm v. Cotzhausen*, 38 Wis. 139; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775.

¹⁶⁸ *Elser v. Rommel*, 98 Mich. 74, 56 N. W. 1107.

Right to Collect and Appropriate — Judgment Record — Account Books.

§ 167. Neither the right to collect and appropriate nor the possession of the best or only evidence to prove the nature and amount of a chose in action necessarily includes a possession of it in such a sense that it may be attached by summoning as garnishee the person holding such right or evidence. For example, a judgment can be attached only by garnishing the judgment debtor, and never by garnishing the officer holding the official records of it.¹⁶⁹ A fortiori, ordinary debts on account can be attached only by summoning the debtors, and not by garnishing the person to whom they have been assigned for collection or as security or otherwise,¹⁷⁰ or who may be in possession of the defend-

¹⁶⁹ Daley v. Cunningham, 3 La. Ann. 55; Hanna v. Bry, 5 La. Ann. 651, 52 Am. Dec. 606; Osborn v. Cloud, 23 Iowa, 104, 92 Am. Dec. 413; McBride v. Fallon, 65 Cal. 301, 4 Pac. 17.

A judgment cannot be attached by garnishing the attorney of record for the judgment creditor. In re Flandrow, 84 N. Y. 1.

¹⁷⁰ Ide v. Harwood, 30 Minn. 191, 14 N. W. 884; Hitchcock v. Eger-ton, 8 Vt. 202; Fuller v. Jewett, 37 Vt. 473; Smith v. Wiley, 41 Vt. 19; Mayes v. Phillips, 60 Miss. 547; Deacon v. Oliver, 14 How. 610. Compare Shaver Wagon & Carriage Co. v. Halsted, 78 Iowa, 730, 43 N. W. 623.

DOUBLE LIABILITY: "There is another objection to construing the statute as authorizing the garnishment of debts by service upon another than the debtor, and without notice to him. Such a method of garnishment would often subject innocent debtors to great and unnecessary hardship. Such a garnishment having been effected, the debtor might innocently make payment to his creditor, and then be compelled to pay a second time, through the enforcement of the garnishee lien; for the garnishment, if effectual, attaches the debt, and renders the debtor liable to the enforcement against him of the final execution in the action." Ide v. Harwood, 30 Minn. 191, 14 N. W. 884.

ant's books of account showing the nature and amount of the debts.¹⁷¹

The Written Evidence must be Connected with the Debt.

§ 168. Those written evidences of debt which may be regarded as indicia of title, such as notes, drafts, bonds, stock certificates, and the like, which in ordinary business transactions are required to be produced

¹⁷¹ ACCOUNT BOOKS: *Rosenthal v. Muskegon Circuit Judge*, 98 Mich. 208, 214, 57 N. W. 112; *Ide v. Harwood*, 30 Minn. 191, 14 N. W. 884.

A bank took possession of the defendant's account books and stock of goods under an assignment to it as security, and, after it had obtained satisfaction of its claim from the proceeds of goods taken under such assignment, and sold, was summoned as garnishee. The court held that the garnishee could be charged for the books and accounts, but that it was not liable for moneys collected by the defendant after the indebtedness to the bank had been satisfied, and after the bank had relinquished the books of account to the defendant, the assignment not being fraudulent, and the bank having acted in good faith. *Mitchell v. Green*, 62 N. H. 588.

Under a statute authorizing officers having writs of attachment for service to seize the defendant's books of account and other evidences of indebtedness, and summon as garnishees every person appearing thereby to be indebted to him, and providing that all debts and choses in action shall be bound by such attachment "from the date of the service thereof," an officer having a writ in favor of A. seized certain books of account and a promissory note, and afterwards levied upon the same property in favor of B., who gave him a list of persons to be garnished, including the maker of the note. The officer summoned the maker of the note under B.'s writ, and four days afterwards summoned him under A.'s writ, whereupon the maker of the note paid the amount thereof into court, and was discharged. The court held that the sheriff was not required to summon all persons appearing to be indebted, but only such as the plaintiff directed; that the debts were attached, not by the seizing of the books, but by the summoning of the debtors, and that B. was entitled to the money. *Boone v. McIntosh*, 62 Miss. 744.

whenever the debt or demand represented thereby is paid or transferred, and without which men of ordinary prudence would not deal, are the only instruments which are so intimately connected with the demands charged therein that the seizure of them can be regarded as equivalent to a seizure of the debt or demand itself, and therefore these only can be attached by garnishment.¹⁷²

Mortgaged, Pledged, and Incumbered Property.

Who Holds Legal Title.

§ 169. In some states an unforeclosed chattel mortgage is a mere lien, and the legal title remains in the mortgagor after condition broken until the property is sold on foreclosure sale.¹⁷³ In other states the mortgagee is held to have the legal title from the time the mortgage is given, and the mortgagor has merely the equity of redemption.¹⁷⁴

¹⁷² *Ide v. Harwood*, 30 Minn. 191, 14 N. W. 884. See, also, above cases.

A United States voucher is garnishable as a chose in action. *Leighton v. Heagerty*, 21 Minn. 42.

Insurance policies upon which holder as assignee has sued the insurance company are garnishable in assignee's hands in suit against assignor to reach his residuary interest. *McDonald v. Creager* (Iowa) 65 N. W. 1021.

An assignee of stock, held to have a claim superior to one garnishing the person having possession of the certificate. *Younkin v. Collier*, 47 Fed. 571.

¹⁷³ *Wilson v. Montague*, 57 Mich. 638, 24 N. W. 851; *Knowles v. Herbert*, 11 Or. 54, 240, 4 Pac. 126.

¹⁷⁴ For an extended review of the decisions on this subject, see *Jones, Chat. Mortg.* 699-703.

Mortgagor's Equitable Interest not Garnishable.

§ 170. Where the latter view obtains, it is necessary, in deciding whether property belonging to the defendant, but subject to a mortgage, can be reached by a garnishment, to consider whether in that state equitable claims may be attached by garnishment.¹⁷⁵ If the mortgagor has but an equity of redemption, the legal title being in the mortgagee, and garnishment be considered as a purely legal proceeding by which equitable rights cannot be attached, it would seem to follow logically that a mortgagor's interest cannot be attached by garnishment. Some of the courts seem to have accepted this doctrine,¹⁷⁶ and it has been generally declared by text writers.¹⁷⁷

¹⁷⁵ See ante, §§ 153, 154.

¹⁷⁶ *Dieter v. Smith*, 70 Ill. 168.

GOODS HELD IN PLEDGE: Held, that the pledgee of goods cannot be charged as garnishee of the pledgor for any property taken in pledge. *Hudson v. Hunt*, 5 N. H. 538; *Whitney v. Dean*, 5 N. H. 249; *Patterson v. Harland*, 12 Ark. 158; *Picquet v. Swan*, 4 Mason, 443, Fed. Cas. No. 11,133. CONTRA, *Ellis v. Goodnow*, 40 Vt. 237. It is generally agreed that the title to property does not pass to the pledgee by virtue of the pledge, and therefore the argument above stated could have no bearing in such cases. *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469. Probably, the true reason for most, if not all, of the decisions seeming to support this doctrine, was the inability of the courts to see how the garnishment could be made effectual and the rights of all the parties preserved intact.

¹⁷⁷ *Drake*, Attachm. § 539; *Wade*, Attachm. § 440; *Freem. Ex'ns*, § 117.

These writers rely principally upon the cases above cited, and *Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202; *Haven v. Low*, 2 N. H. 13, 9 Am. Dec. 25; *Holbrook v. Baker*, 5 Me. 309, 17 Am. Dec. 236. But see *Arnold v. Elwell*, 13 Me. 261.

"In some cases our trustee process might furnish a remedy; as where, by agreement of parties, the pawn or mortgaged property is

Mortgagor's Equitable Interest Garnishable.

§ 171. But other courts which have not declared equitable rights generally attachable by garnishment, although appreciating the logic of this doctrine, discovered its iniquity also, and refuse to adopt it. The supreme court of Nebraska says: "The only remaining question is whether the judgment debtor's equity of redemption, or interest in the two promissory notes, could be reached and held by the process of garnishment. It must be conceded that, according to most of the cases bearing upon this question, it could not. Wait, Act. & Def. 422, 423. Following this general current of authorities, we held in *Peckinbaugh v. Quillen*, 12 Neb. 586, 12 N. W. 104, that it is only where a mortgagor of goods has the right of possession for a definite period that he has an attachable interest in them. This rule did not influence the result of that case, however, for the reason that the property was insufficient to satisfy the mortgage debt. But in view of our attachment law, the ruling of the supreme court of Ohio on a statute from which ours was copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them in this state may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment, if they have passed into the hands of the mortgagee; and

sold by the pawnee or mortgagee, and a surplus remains over the debt secured. But, where there is no agreement that the mortgagee shall sell the mortgaged property, he could not be compelled to do it, and would not be chargeable as trustee." *Badlam v. Tucker*, supra; *Adams v. Wheeler*, 10 Pick. 199.

to this extent our opinion in the case of *Peckinbaugh v. Quillen* must be modified.”¹⁷⁸

Nature of Judgment for Mortgagor's Interest.

§ 172. Eliminating this question, we may consider together mortgaged property and property otherwise incumbered. When the mortgagee or pledgee is in possession, and is made the garnishee, no money judgment can be rendered against him for the difference between the amount of the secured debt and the estimated value of the property. The only proper judgment is that he surrender the property upon payment or tender of the amount of his claim upon it, and that for failure to do so on demand execution may be levied on his own property to satisfy the plaintiff's judgment.¹⁷⁹ If the plaintiff does not want such a judg-

¹⁷⁸ *Burnham v. Doolittle*, 14 Neb. 214, 15 N. W. 606. To the same effect, see *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669; *Carthy v. Fenstermaker*, 14 Ohio St. 457; *Torbert v. Hayden*, 11 Iowa, 435, 444; *Davis v. Wilson*, 52 Iowa, 187, 3 N. W. 52; *Buck-Reiner Co. v. Beatty*, 82 Iowa, 353, 48 N. W. 96; *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113.

“Any other construction would enable a debtor, when sued, to put all his chuses in action beyond the reach of his creditors by transferring them in large amounts as collateral for insignificant sums which he might borrow for that purpose.” *Chesapeake Guano Co. v. Sparks*, 18 Fed. 281.

MORTGAGED SHIPS: Admitting that, before the mortgagee takes possession, the interest of the mortgagor in property may be attached by garnishment, a vessel, a mortgage upon which is duly recorded as provided by act of congress, is not subject to garnishment under the state laws, in an action against the mortgagor. *Howe v. Tefft*, 15 R. I. 477, 8 Atl. 707.

¹⁷⁹ See post, § 393.

MORTGAGE TO BE PAID BEFORE JUDGMENT: Held, that the proper practice is to continue the garnishment suit until the se-

ment, but desires the property sold under the direction of the court, the expenses of the sale cannot be charged against the property, to the detriment of the incumbrancer;¹⁸⁰ and the property can be offered for sale only in gross or subject to the lien, for no sale can be made unless a greater sum than the amount of the lien can be realized, and the outcome of a sale in parcels cannot be known when the sale is begun.¹⁸¹

Duties of Mortgagee as Garnishee.

§ 173. If, for the purpose of satisfying his claim, the lienholder proceeds under his right to sell, he is not bound to obtain the highest possible price for the goods, but he must exercise common business prudence and good faith in the conversion of them, and, to the extent of his failure to do so, he is liable to the gar-

cured debts are satisfied, and then require the garnishee to make a supplemental answer showing the surplus. *Carter v. Bush*, 79 Tex. 29, 15 S. W. 167.

"If the creditor claims that there is a surplus of property, he must redeem it by paying off the lien of the trustees." *McGregor v. Chase*, 37 Vt. 225. In that manner he may attach the defendant's interest. *Perrin v. Russell*, 33 Vt. 44.

¹⁸⁰ *Smith v. Menominee Circuit Judge*, 53 Mich. 560, 19 N. W. 184.

¹⁸¹ *Smith v. Menominee Circuit Judge*, 53 Mich. 560, 19 N. W. 184.

SALE FOR LESS THAN MORTGAGE: The garnishee mortgagee is entitled to the payment of his claim or the return of his security; and, if the plaintiff causes the security to be sold for less than the mortgage, the court should give judgment against him in favor of the mortgagee for the difference. *McDonald v. Faulkner*, 154 Mass. 34, 27 N. E. 883.

DISPENSING WITH SALE BY PROVING VALUE: When it appears without dispute that the property is not sufficient to satisfy valid incumbrances, there is no error in discharging the garnishee without attempting a sale. *Boston Loan & Trust Co. v. Organ*, 53 Kan. 386, 36 Pac. 733.

nishing creditor.¹⁸² The burden is on the garnishee claiming the lien to show in such cases that he has properly discharged his duty to the plaintiff in conducting the sale.¹⁸³

¹⁸² Merchants' & Manufacturers' Bank v. William A. Baeder Glue Co., 164 Pa. St. 1, 30 Atl. 290.

A garnishee, holding five insurance policies, by assignment, as security for \$2,614.10, had brought suit on the same, and the court, entertaining the garnishment, ordered that he proceed to collect the same, and, after paying his own claim and expenses, apply the balance to the satisfaction of the plaintiffs' judgment. Upon an order to the garnishee to account for the money collected, the court held that under the former order the garnishee was authorized to contract and pay necessary expenses, but that he could not bind the fund by contracting other or greater expenses, and that, if he agreed to pay more than reasonable fees, the amount in excess of proper fees must be paid by himself personally, and could not be charged against the fund. McDonald v. Creager (Iowa) 65 N. W. 1021.

FORECLOSURE AFTER GARNISHMENT: After the garnishment, the mortgagee cannot foreclose, and thus defeat the attachment, and obtain absolute title before the plaintiff can get the case to a hearing. Hobart v. Jouvett, 6 Cush. 105. Compare Spencer v. Moran, 80 Iowa, 374, 45 N. W. 902. Held, that the garnishee may be restrained from enforcing his lien. Gary v. Brown, 33 Ill. App. 435.

ESTOPPEL BY ACQUIESCENCE: The plaintiff is not estopped by permitting the mortgagee to take possession and dispose of the property, nor by a twenty-months silence thereafter. Sanger v. Guenther, 73 Wis. 354, 41 N. W. 636.

¹⁸³ Indianapolis Bank v. Armstrong, 101 Ind. 244. But see Mensing v. Engelke, 67 Tex. 532, 4 S. W. 202.

It is not sufficient that the property was sold at a sacrifice. The garnishee is not chargeable unless it appears that, if sold properly, there would have been a surplus after paying the mortgages. Hawks v. Sawyer, 38 Vt. 99.

Plaintiff Only Acquires Defendant's Interest.

§ 174. The garnishment only secures to the plaintiff the interest of the defendant in the property, subject to all valid claims upon it.¹⁸⁴ Whatever is left after the secured debts are paid or satisfied the plaintiff is entitled to, and no more;¹⁸⁵ but the fact that

¹⁸⁴ Outcalt v. During, 25 N. J. Law, 443; Smith v. Menominee Circuit Judge, 53 Mich. 560, 19 N. W. 184; Weed v. Merick, 62 Mich. 414, 29 N. W. 78; Cooley v. Minnesota Transfer Ry. Co., 53 Minn. 327, 55 N. W. 141; Williams v. Gallick, 11 Or. 337, 3 Pac. 469; Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518; Howe v. Jones, 57 Iowa, 130, 8 N. W. 451.

PREMATURE SEIZURE—CONVERSION: It does not matter who has possession, and premature seizure of the property by the mortgagee will not render him liable for a conversion of the whole, nor for the value of the property over the mortgage before he has disposed of it, but only for the balance after his debt is paid. Daggett v. McClintock, 56 Mich. 51, 22 N. W. 105.

But when the mortgagee sold the property for part cash, and took notes in his own name for balance, it was held to amount to a conversion which renders him liable to a money judgment for the balance over his own claim. Smith v. Weaver, 41 Vt. 19.

MORTGAGE TO SEVERAL VALID AS TO ONE: When property is assigned as security to the assignee and others, the assignee may hold it against a garnishing creditor of the assignor, though no consideration supports the assignment as to the others. Marks v. Anderson, 1 Colo. App. 1, 27 Pac. 168.

¹⁸⁵ Durling v. Peck, 41 Minn. 317, 43 N. W. 65; Cooley v. Minnesota Transfer Ry. Co., 53 Minn. 327, 55 N. W. 141; Little Wolf River Imp. Co. v. Jackson, 66 Wis. 42, 27 N. W. 625; Warder v. Baker, 67 Wis. 409, 30 N. W. 932; Bragunier v. Beck & Corbett Iron Co., 41 Kan. 542, 21 Pac. 640; Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348; Spencer v. Moran, 80 Iowa, 374, 45 N. W. 902; McConnell v. Denham, 72 Iowa, 494, 34 N. W. 298; Chesapeake Guano Co. v. Sparks, 18 Fed. 281.

INSUFFICIENT DESCRIPTION: One holding a mortgage on "our books of accounts and accounts due and to become due" is not entitled to priority to one bringing garnishment against one owing on

the secured debt is not certain in amount will not defeat the garnishment;¹⁸⁶ and, if the lien becomes di-

these accounts, for the reason that the description is insufficient. *Lawrence v. McKenzie*, 88 Iowa, 432, 55 N. W. 505.

SECURITY LESS THAN SECURED DEBT: If the security is less than the debt secured, the garnishee must be discharged. *Hall v. Page*, 4 Ga. 429; *Kergin v. Dawson*, 6 Ill. 86; *Fuller v. Rhodes*, 78 Mich. 36, 43 N. W. 1085; *Younkin v. Collier*, 47 Fed. 571; *Bradley v. Byerley* (Kan. App.) 42 Pac. 930.

SALE BEFORE GARNISHMENT—SURPLUS: Any surplus after satisfaction of the mortgage upon a sale made before the garnishment belongs to the defendant, and is attached by the garnishment. *Hoffman v. Witherell*, 42 Iowa, 89.

INSURANCE FOR MORTGAGEE: To the extent of his interest in money due on a fire insurance policy payable to the mortgagee "as his interest may appear," the claim of the mortgagee is paramount to the claim of the garnishing creditor of the mortgagor. *Mansfield v. Stevens*, 31 Minn. 40, 16 N. W. 455; *Coykendall v. Ladd*, 32 Minn. 529, 21 N. W. 733; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 24 N. W. 407.

MONEY DUE FOR WOOD CUT FROM MORTGAGED LAND without the mortgagee's consent may be claimed by him against a garnishing creditor of the mortgagor. *Cotta v. O'Neal*, 58 N. H. 572.

AN ATTORNEY'S LIEN for services is paramount to a subsequent garnishment of the judgment debtor in a suit against the judgment creditor. *Myers v. McHugh*, 16 Iowa, 335; *Gager v. Watson*, 11 Conn. 168; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821. Compare *Ward v. Sherbondy* (Iowa) 65 N. W. 413.

A STABLEMAN'S LIEN is paramount to a garnishment served upon him. *Williamson v. Gayle*, 7 Grat. (Va.) 152.

A COMMISSION MERCHANT'S LIEN, same. *Bank v. Levy*, 1 McMul. (S. C.) 431.

A MORTGAGE ON RAILROAD TOLLS is superior to a subsequent garnishment. *Galena & C. U. Ry. Co. v. Menzies*, 26 Ill. 122. But see *Johnston v. Riddle*, 70 Ala. 219.

STOPPAGE IN TRANSITU cannot be defeated by garnishment in a suit against the consignee. *Chicago, B. & Q. Ry. Co. v. Painter*, 15 Neb. 394, 19 N. W. 488.

¹⁸⁶ *Trunkey v. Crosby*, 33 Minn. 464, 23 N. W. 846.

vested after the garnishment, the plaintiff acquires the same rights as if no lien ever existed.¹⁸⁷ The touchstone by which the liability of the garnishee is determined in these as in other cases is that the plaintiff steps into the defendant's shoes, and acquires his rights,—no more and no less.¹⁸⁸

Actual Possession—Double Security—Right of Possession.

§ 175. He cannot require the mortgagee, as garnishee, to take possession of the mortgaged property for his benefit. It is the possession of the property of the defendant which renders the garnishee liable, and never the taking or holding of a mortgage upon it.¹⁸⁹ He cannot require the mortgagee to surrender one security, and look to another, when he has two.¹⁹⁰ If

¹⁸⁷ Swett v. Brown, 5 Pick. 178.

If the pledgee waives his lien, the objection does not lie in the mouth of the general owner. Meeker v. Wilson, 1 Gall. 419, Fed. Cas. No. 9,392.

¹⁸⁸ See ante, § 46.

¹⁸⁹ Folkerts v. Standish, 55 Mich. 463, 21 N. W. 891; Curtis v. Raymond, 29 Iowa, 52; First Nat. Bank v. Perry, 29 Iowa, 266; Kiggins v. Woodke, 78 Iowa, 34, 34 N. W. 789; Farwell v. Wilmarth, 65 Wis. 160, 26 N. W. 548; Spitz v. Tripp, 86 Wis. 25, 56 N. W. 330; Central Bank v. Prentice, 18 Pick. 396; Callender v. Furbish, 46 Me. 226. But see Emery v. Seavey, 148 Mass. 566, 20 N. E. 177.

¹⁹⁰ Scofield v. Sanders, 25 Vt. 181; Goddard v. Bridgman, 25 Vt. 351, 60 Am. Dec. 272; Morton v. Graffin, 68 Md. 545, 13 Atl. 341, 345.

MARSHALING SECURITIES: The general principles of equity in respect to marshaling apply in favor of the garnishing creditor to the extent that a garnishee will be required to apply to the claim having precedence to the garnishment money collected on one security since the garnishment, so as to relieve the other in favor of the garnishing creditor, rather than apply it on an after-acquired demand of his own. Edgerton v. Martin, 35 Vt. 116.

the defendant could not take it from his possession without satisfying his claim, the plaintiff cannot.¹⁹¹

Mortgagee's Rights not Increased or Impaired—Future Advances.

§ 176. If the garnishee or any one else has a lien on the property as against the defendant, he has the same against the plaintiff; and, if he could claim none against the defendant, he has none against the plain-

¹⁹¹ Smith v. Menominee Circuit Judge, 53 Mich. 560, 19 N. W. 184; Weed v. Merick, 62 Mich. 414, 29 N. W. 78; Smith v. Clarke, 9 Iowa, 241; Kergin v. Dawson, 6 Ill. 86; Carter v. Bush, 79 Tex. 29, 15 S. W. 167; Outcalt v. Durling, 25 N. J. Law, 443; Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518; Cheatham v. Seawright, 30 S. C. 101, 8 S. E. 526.

GIVING BOND NO WAIVER: The holder of property under pledge does not waive his lien by giving bonds to prevent being dispossessed of the property. Outcalt v. Durling, 25 N. J. Law, 443.

RIGHT TO INTERFERE WITH MORTGAGEE'S POSSESSION: Cooley, C. J.: "We have grave doubts of the right to take from a mortgagee of chattels the property upon which he has a lien, except where, for the protection of the rights of others, the necessity shall be apparent. It is a serious interference with his contract rights. It is a part of his security that the mortgage gives him authority to take the property into his own possession; and nothing which may subsequently be done by or against the mortgagor can rightfully diminish or affect this security. When a resort to legal remedies becomes essential, all parties concerned may be required to submit to some inconvenience, and perhaps to some loss; but in a case where, as in this case, the legal remedy is only sought for the purpose of reaching a surplus after a lien is satisfied, and the lien holder is not concerned in the controversy, it cannot be rightful to make the burden or the cost of the litigation fall upon him, or to take from him substantial rights for the convenience of the parties litigant. * * * It would have been proper to empower him [the receiver] to examine the property, and inventory it, for the purpose of an intelligent sale." Smith v. Menominee Circuit Judge, 53 Mich. 560, 19 N. W. 184. Compare Gery v. Brown, 33 Ill. App. 435; Coombs v. Davis, 2 Wash. T. 466, 7 Pac. 860.

tiff.¹⁹² Though, by contract with the defendant, the mortgagee or pledgee has a right to advance money and claim a lien on the property in his possession for the amount advanced, he cannot defeat the garnishment by advances made after the summons is served on him.¹⁹³

Real Property.

§ 177. Real estate has generally been considered not to be attachable by garnishment proceedings, upon the double ground that it is not included in the terms of the statute declaring what property may be reached by garnishment, and that the process is ill adapted to such use, and difficulties would attend its practical application to such property. For a discussion of these views, the reader is referred to the cases given below.¹⁹⁴ However, it has generally been held that a garnishee may be questioned as to real estate in his

¹⁹² *Allen v. Hall*, 5 Metc. (Mass.) 263; *Brewer v. Pitkin*, 11 Pick. 298; *Allen v. Megguire*, 15 Mass. 490; *Bailey v. Ross*, 20 N. H. 302; *Minthorn v. Hemphill*, 73 Iowa, 257, 34 N. W. 844.

In South Carolina it was provided by statute that the garnishee, if lawfully in possession of the defendant's property, may retain it till the debts due from the defendant to him are paid. *Yongue v. Linton*, 6 Rich. Law, 275; *Mitchell v. Byrne*, Id. 171.

¹⁹³ *McCown v. Russell*, 84 Wis. 122, 54 N. W. 31; *Crain v. Gould*, 46 Ill. 293; *Barnard v. Moore*, 8 Allen, 273; *Finnigan v. Floeck* (Tex. Civ. App.) 28 S. W. 268. See, also, ante, §§ 65, 45.

¹⁹⁴ *Banning v. Sibley*, 3 Minn. 389 (Gil. 282, 296); *Moor v. Towle*, 38 Me. 133; *Stedman v. Vickery*, 42 Me. 132; *Plummer v. Rundlett*, Id. 365; *How v. Field*, 5 Mass. 390; *Dickinson v. Strong*, 4 Pick. 57; *Ripley v. Severance*, 6 Pick. 477, 17 Am. Dec. 397; *Gore v. Clisby*, 8 Pick. 555; *Bissell v. Strong*, 9 Pick. 562; *Sanford v. Bliss*, 12 Pick. 116; *Seymour v. Kramer*, 5 Iowa, 285; *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. 145; *Risley v. Welles*, 5 Conn. 431; *Wright v. Boswell*, 7

possession held in trust for the defendant, or for the rents or proceeds of which he is accountable to the defendant; and, if so found accountable, he could, of course, be charged for the amount of the fund.¹⁹⁵ The statutes in some of the states expressly make the garnishee chargeable for the real property of the defendant in his possession or control at the time the garnishment summons is served.¹⁹⁶

N. H. 590; *Baxter v. Currier*, 13 Vt. 615; *Hunter v. Case*, 20 Vt. 195; *Stevens v. Kirk*, 37 Vt. 204; *Woodward v. Wyman*, 53 Vt. 645; *Executor of Doane v. Doane*, 46 Vt. 485.

One receiving conveyance of land as security for debt was held liable as garnishee for the value over the amount of the debt. *Pier-son v. Weller*, 3 Mass. 464. *Contra*, *Farwell v. Wilmarth*, 65 Wis. 160, 26 N. W. 548.

A DEBT DUE FOR LAND PURCHASED of the defendant is as garnishable as any other debt. *First Nat. Bank v. Brainerd*, 28 Fed. 917; *Smith v. Wiley*, 41 Vt. 19.

¹⁹⁵ *Russell v. Lewis*, 15 Mass. 127; *Hazen v. Emerson*, 9 Pick. 144. Compare *Boardman v. Roe*, 13 Mass. 104; *Bell v. Kendrick*, 8 N. H. 520; *Moor v. Towle*, 38 Me. 133.

¹⁹⁶ 3 How. Ann. St. Mich. § 8059; Sanb. & B. Ann. St. Wis. § 2753. Compare *Boston Loan & Trust Co. v. Organ*, 53 Kan. 386, 36 Pac. 733.

CHAPTER VI.

THE GARNISHEE'S POSITION, RIGHTS, AND DUTIES.

- § 178. Position in General.
- 179. As a Defendant.
- 180. As a Receiver.
- 181. As a Witness.
- 182. Rights of the Garnishee.
- 183. Duties of the Garnishee—To the Plaintiff.
- 184. — To Third Persons.

Position in General.

§ 178. The complainant in a bill of interpleader in chancery occupies a position more nearly analogous to that of the modern garnishee than any other party to a suit known to the history of jurisprudence.¹ In one sense the garnishee is a witness merely, subpoenaed and fees paid for attending and testifying in a suit wherein he is not a party and has no interest. In another sense he is a receiver for the court, to hold the property in suit till the litigation is concluded and the rights of the contending parties are adjudicated and settled, whereupon he pays or delivers the property in accordance to the order of the court; and in this capacity it is a favorite expression of the courts to call him a "disinterested stakeholder." In still another sense he is a party defendant to a suit in court, has been summoned to appear and plead, and, unless he confess the claim in the plaintiff's declaration (affidavit or denial of the answer) or suffer judgment by de-

¹ Story, Eq. Jur. c. 20; Providence Inst. for Sav. v. Barr, 17 R. I. 131, 20 Atl. 245.

fault, an issue is in due time formed between him and the plaintiff, and brought on for trial. All three of these elements combine in every garnishment suit to render the position of the garnishee anomalous, and one or the other predominates according to the facts of each particular case. In the average case the garnishee is a disinterested party in fact, so far as any reward he expects to derive from the litigation is concerned, and his only interest is to escape from the conflict without personal injury; and in this respect we can do no better than to quote the language of the supreme court of Michigan: "At common law the debtor had the privilege of choosing who should be his creditor. Under this statute of garnishment he is deprived of that privilege. The law steps in between the two, and says another shall be his creditor, although the latter be his worst enemy; and the debtor is also compelled to submit to the vexation and expense of a suit in which the advice and counsel of a good lawyer must be secured, in order to avoid the hazard of a double liability. The first creditor is always on the alert to see that his claim is legally transferred to the second, which he has a right to do."² Being thus ground between the upper and lower stones often renders the position of the garnishee a hard one, subjecting him to expense and perhaps double liability without his fault.³ But, of course, these are ex-

² *Ettelsöhn v. Fireman's Fund Ins. Co.*, 64 Mich. 334, 31 N. W. 201. For similar remarks, see *Rothschild v. Burton*, 57 Mich. 544, 25 N. W. 49; *Steen v. Norton*, 45 Wis. 412.

³ See *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 56 N. W. 711; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938.

ceptions, and not the rule; and our laws, while seeking at all times to avoid inflicting positive injury, must aim to promote the general welfare of the people, and it is far better that one should be slightly inconvenienced than that the law should furnish only an inadequate remedy to the masses. The laws cannot be made perfect. Experience has shown the remedy to be eminently practicable as a means of civil justice, without inflicting injury, except in very rare cases, which is a fault common to all human remedies, and the tendency is rather to expand than to restrict it.

As a Party Defendant.

§ 179. Most of the statutes provide for the forming and trial of an issue between the plaintiff and garnishee very similar in effect to an ordinary trial in other actions,⁴ and in this aspect the proceeding is an action in which the garnishee is the defendant.⁵ This feature becomes plainly visible when the garnishee assumes the attitude of a litigant. It is then in every respect a suit in which the primary object is to obtain a judgment against the garnishee. It is commenced by process; the parties must have a day in court; pleadings are made and filed; an issue formed and tried; evidence adduced; judgment rendered; costs adjudged; and finally execution issued, levied, and collected.⁶

⁴ See post, § 352 et seq.

⁵ See ante, § 3.

⁶ *Tunstall v. Worthington*, Hempst. 662, Fed. Cas. No. 14,239; *Lackett v. Rumbaugh*, 45 Fed. 23, 26.

As a Receiver.

§ 180. From the time of the service of the garnishment summons on the garnishee, all property in his possession or control belonging to the principal defendant and debts owed by him to the principal defendant are quasi in custodia legis;⁷ and the garnishee thereby acquires special rights as agent of the court,⁸ and, while the proceeding is pending, is entitled to retain the garnished property against all persons whatsoever, including the absolute owner, who is a stranger to the suit.⁹ As receiver or stakeholder for the court, he is presumed to be a disinterested party.¹⁰ Pending the suit he holds the property in very much the same manner as a receiver appointed by a court of chancery. He may be restrained from disposing of it,¹¹ or may be ordered to pay it into court where his personal rights are not involved,¹² and may be punished for contempt in disobeying the orders of the court.¹³

⁷ See post, §§ 193, 194.

⁸ *Erskine v. Staley*, 12 Leigh (Va.) 406.

⁹ *Stiles v. Davis*, 1 Black, 101; *Cooley v. Minnesota Transfer Ry. Co.*, 53 Minn. 327, 55 N. W. 141.

¹⁰ *Bethel v. Linn*, 63 Mich. 464, 471, 30 N. W. 84; *Porter v. Stevens*, 9 Cush. 530; *Wilder v. Weatherhead*, 32 Vt. 765, 767; *Hewitt v. Follett*, 51 Wis. 264, 272, 8 N. W. 177; *Phipps v. Rieley*, 15 Or. 494, 16 Pac. 185; *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148.

¹¹ *Malley v. Altman*, 14 Wis. 22; *Almy v. Platt*, 16 Wis. 169; *Bragg v. Gaynor*, 85 Wis. 468, 481, 55 N. W. 919, 923. Compare *More v. Kidder*, 55 N. H. 488.

¹² *Johann v. Rufener*, 32 Wis. 195, 198.

¹³ *Johann v. Rufener*, 32 Wis. 198.

Held, that the garnishee may be punished for contempt for disposing of the property. *Lilienthal v. Waliach*, 37 Fed. 241.

See, also, post, § 193.

As a Witness.

§ 181. As has been before remarked, the garnishee has many of the attributes of a witness. He is subpoenaed to testify in a cause between other parties, and is paid the fees and mileage of a witness. It is held under several of the garnishment statutes that the garnishee is the witness of the plaintiff, and his only witness,¹⁴ except for the purpose of explaining and corroborating the disclosure;¹⁵ that the plaintiff can give no evidence to impeach or contradict him;¹⁶ that no recovery can be had except on his admitted liability;¹⁷ and if the plaintiff fails to make out a prima

¹⁴ Hackley v. Kanitz, 39 Mich. 398; Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Karp v. Citizens' Nat. Bank, 76 Mich. 679, 681, 43 N. W. 680.

¹⁵ Maynards v. Cornwell, 3 Mich. 309, 313; Newell v. Blair, 7 Mich. 103, 105; Thomas v. Sprague, 12 Mich. 120, 122; Zimmer v. Davis, 35 Mich. 39; Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Lyon v. Kneeland, 58 Mich. 570, 25 N. W. 518; Barber v. Howd, 85 Mich. 221, 48 N. W. 539; Chase v. North, 4 Minn. 381 (Gil. 288).

The garnishee having sworn that he would be indebted to the defendant on the completion of a house, the plaintiff may show by his own oath that the house is complete, though the garnishee object. Zimmer v. Davis, 35 Mich. 39. CONTRA: Recovery can be had only on the disclosure alone. Sweet v. Read, 12 R. I. 121; Raymond v. Narragansett Tinware Co., 14 R. I. 310.

¹⁶ Banning v. Sibley, 3 Minn. 389 (Gil. 282, 296); Chase v. North, 4 Minn. 381 (Gil. 288); Cole v. Sater, 5 Minn. 468 (Gil. 378, 381); Maynards v. Cornwell, 3 Mich. 309, 313; Newell v. Blair, 7 Mich. 103, 105; Sexton v. Amos, 39 Mich. 695, 698; Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Sutherland v. Burrill, 82 Mich. 13, 17, 45 N. W. 1122; Nutter v. Framingham & L. Ry. Co., 131 Mass. 231.

¹⁷ Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Walker v. Detroit, G. H. & M. Ry. Co., 49 Mich. 448, 13 N. W. 812; Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11,133.

facie case by the disclosure,¹⁸ or it leaves a reasonable doubt as to the garnishee's liability,¹⁹ the suit fails, and the garnishee must be discharged. If, after issue joined, the plaintiff calls the garnishee to the stand to testify, he thereby makes him his witness in any case; but even then he may, in the discretion of the court, be permitted to question the garnishee as to former statements inconsistent with the testimony being given.²⁰

Rights of the Garnishee.

§ 182. As has been observed, the garnishment in no way prejudices the personal interests of the garnishee in the property intended to be attached by the garnishment, and cannot deprive him of any of his contract or statutory rights.²¹ We now propose to consider the rights he has in respect to the garnishment proceedings. He has a right to examine the proceedings in the principal suit so far as to ascertain that they are sufficient to give the court jurisdiction of the garnishment proceedings, and afford him protection from future liability, and to stand upon the objection if they are not.²² He has a right to urge the

¹⁸ *Wellover v. Soule*, 30 Mich. 482; *Lorman v. Phoenix Fire Ins. Co.*, 33 Mich. 65, 67; *Hackley v. Kanitz*, 39 Mich. 398; *Spears v. Chapman*, 43 Mich. 541, 5 N. W. 1038; *Weirich v. Scribner*, 44 Mich. 73, 6 N. W. 91; *Walker v. Detroit, G. H. & M. Ry. Co.*, 49 Mich. 448, 13 N. W. 812; *Lyon v. Kneeland*, 58 Mich. 570, 25 N. W. 518.

¹⁹ *Pioneer Printing Co. v. Sanborn*, 3 Minn. 413 (Gil. 304); *Chase v. North*, 4 Minn. 381 (Gil. 288); *Cole v. Sater*, 5 Minn. 468 (Gil. 378, 381). See, also, post, § 314.

²⁰ *Trunkey v. Crosby*, 33 Minn. 464, 23 N. W. 846. Contra, *Nutter v. Framingham & L. Ry. Co.*, 131 Mass. 231.

²¹ See ante, §§ 48, 61.

²² See post, § 225.

exemption of the property or debt in his possession in favor of the principal defendant,²³ or any other fact which would entitle him to be discharged. The garnishee may insist that no judgment shall be rendered against him till all persons claiming the property in his possession or the debt owed by him have been made parties to the suit, so as to be bound by the judgment rendered therein.²⁴ He may admit away his own rights, but he has no power to admit away the rights of others.²⁵ Likely, however, the garnishee may escape further liability to the defendant or any other person by giving him or them notice of the garnishment proceedings, and warning him or them to appear and defend the same, or be forever estopped by the result, whatever it may be;²⁶ but mere notice without offer of opportunity to defend is not sufficient.²⁷

Duties of the Garnishee.

To Plaintiff.

§ 183. No duties are placed upon the garnishee as such until he has been actually served with process. Notice that garnishment papers are being prepared to serve on him puts him under no obligation to withhold

²³ See ante, § 85.

²⁴ *Lyon v. Ballentine*, 63 Mich. 95, 105, 29 N. W. 837; *Kennedy v. McLellan*, 76 Mich. 598, 604, 43 N. W. 641; *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700. See, also, post, § 333.

²⁵ *Hebel v. Amazon Ins. Co.*, 33 Mich. 400, 403; *Tabor v. Van Vranken*, 39 Mich. 793; *Blake v. Hubbard*, 45 Mich. 1, 4, 7 N. W. 204; *Keppel v. Moore*, 66 Mich. 292, 294, 33 N. W. 499; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050. See, also, post, § 271.

²⁶ *Pierce v. Chicago & N. W. Ry. Co.*, 36 Wis. 283, 288; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 652, 57 N. W. 1050.

²⁷ *Crisp v. Ft. Wayne & E. Ry. Co.*, supra; *Adams v. Filer*, 7 Wis. 306, 324, 73 Am. Dec. 410.

the property in his hands for the benefit of the plaintiff.²⁸ But, as soon as the process is served on him, he has active duties to perform. He must impound the property in his possession or the debt owed by him to satisfy any judgment the plaintiff may recover, and he cannot escape liability to the plaintiff therefor by allowing it to be subsequently removed from his control.²⁹ If, after he is served with process, any one attempts to take the property or recover the debt from him by legal process, it is his duty to exhaust all authorized means to prevent it.³⁰ But service of process does not constitute a prohibition of all further business transactions between the garnishee and the defendant; it simply attaches the debt or property owing by him or in his possession.³¹ He may afterwards, without incurring additional liability, make the defendant a gift, or pay him money he was under no obligation to pay,³² or advance him money or goods for labor to be performed thereafter.³³

²⁸ *Fisher v. Hall*, 44 Mich. 494, 7 N. W. 72. Compare *Benbow v. Kollom*, 52 Minn. 433, 54 N. W. 482.

A person who pays his debt for the purpose of avoiding being garnished, or to aid the defendant in keeping his property out of the reach of creditors, does not thus subject himself to any liability. *Fletcher v. Pillsbury*, 35 Vt. 16.

²⁹ *Gibson v. National Park Bank*, 98 N. Y. 87, 95; *Indianapolis Bank v. Armstrong*, 101 Ind. 244. See, also, post, § 192.

³⁰ *Johann v. Rufener*, 32 Wis. 195. Compare *Parker v. Kinsman*, 8 Mass. 436; *Eddy v. O'Hara*, 132 Mass. 56. See, also, post, § 192.

A negligent garnishee is no more entitled to protection than any other negligent party. See post, § 386.

³¹ *Vanderhoof v. Holloway*, 41 Minn. 498, 43 N. W. 331.

³² *Victor v. Hartford Ins. Co.*, 33 Iowa, 210; *Worthington v. Jones*, 23 Vt. 546. Compare *Humphrey v. O'Donnell*, 165 Pa. St. 411, 30 Atl. 992.

³³ *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390; *Archer v. People's*

To Third Persons.

§ 184. The garnishee's duties are not all to the plaintiff. He owes duties to the defendant and all other persons to his knowledge claiming any interest in the property sought to be garnished.³⁴ It is his duty to state in his disclosure every fact in his knowledge, whether hearsay or otherwise, which has any legitimate tendency to show that he ought not to be charged.³⁵ Good faith requires that he should bring to the attention of the court the claims of all persons to the property or debt garnished.³⁶ But he is under no obligation to hunt up evidence as to the real owner,³⁷ or decide the question at his peril.³⁸ If he states what he has heard or knows, so that the claimants may be called and their rights litigated, his duty is performed; or, if he does not know to whom the prop-

Sav. Bank, 88 Ala. 249, 7 South. 53; Callagan v. Pocasset Manuf'g Co., 119 Mass. 173; Van Vleet v. Stratton, 91 Tenn. 473, 19 S. W. 428; Reinhart v. Empire Soap Co., 33 Mo. App. 24; Chicago & E. I. R. Co. v. Blagden, 33 Ill. App. 254; Standard Wagon Co. v. Lowry, 94 Ga. 614, 19 S. E. 989; Hoffman v. Fitzwilliam, 81 Ill. 521; Davis v. Humphrey, 22 Iowa, 137; Carr v. Fairbanks, 28 Vt. 806.

³⁴ Adams v. Filer, 7 Wis. 306, 324; Bushnell v. Allen, 48 Wis. 460, 4 N. W. 599; Rice v. Jones, 103 N. C. 226, 9 S. E. 571; Phipps v. Rieley, 15 Or. 494, 16 Pac. 185.

³⁵ Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168, 172, 37 N. W. 70; Wilson v. Groelle, 83 Wis. 530, 53 N. W. 900; Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 651, 57 N. W. 1050; Black v. Brisbin, 3 Minn. 360 (Gil. 253, 256), 74 Am. Dec. 762.

³⁶ Black v. Brisbin, 3 Minn. 360 (Gil. 253, 256), 74 Am. Dec. 762; Kimball v. Macomber, 50 Mich. 362, 15 N. W. 511; Parker v. Wilson, 61 Vt. 116, 17 Atl. 747; John R. Davis Lumber Co. v. First Nat. Bank, 84 Wis. 1, 54 N. W. 108. See, also, post, § 217.

³⁷ Karp v. Citizens' Nat. Bank, 76 Mich. 679, 43 N. W. 680.

³⁸ Conshohocken Tube Co. v. Iron Car Equipment Co., 167 Pa. St. 592, 31 Atl. 949.

erty in his possession belongs, all he need do is to say so.³⁹ He need not wage battle at every step, nor wait to be led by the shoulder into court. If the proceedings are regular, and he knows of no claimants to the property except the defendant, and it is garnishable property, he will be as much protected by a judgment suffered by default as by one awarded after vigorous contest.⁴⁰

³⁹ Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050.

⁴⁰ See post, §§ 205, 215.

CHAPTER VII.

GARNISHMENTS AND OTHER PROCEEDINGS CONCURRENT —PRIORITY—ADDITIONAL REMEDIES.

- § 185. Garnishment an Additional Remedy.
- 186. — Nothing Discharged till Actual Payment.
- 187. Aid of Equity.
- 188. Concurrent Garnishments of the Same Fund—Priority Depends on Date of Service—Satisfaction or Failure of Prior Garnishment—Effect.
- 189. — Remedies of Subsequent against Prior Garnishing Creditors.
- 190. — Other Garnishments—How Pleaded as Defense.
- 191. — Double Liability from Improper Defense.

Garnishment an Additional Remedy.

§ 185. The right to garnish is provided by law as a special auxiliary remedy for the more effectual recovery of debts, and never was intended to take the place of the remedies provided by common law. A plaintiff may file a creditors' bill, upon return of execution nulla bona, without exhausting his remedy by statutory garnishment;¹ or may maintain a creditors' bill in equity to reach certain property of the defendant, and at the same time prosecute a suit in garnishment to reach other property, and have it applied in satisfaction of the same judgment;² or he may, while the

¹ Vicksburg & M. Ry. Co. v. Phillips, 64 Miss. 108, 1 South. 7. But see Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478.

² Blake v. Hubbard, 45 Mich. 1, 7 N. W. 204.

When it appears that the garnishment proceedings afford a complete remedy, a bill in equity, afterwards filed, to reach the same property will be dismissed. See post, § 331.

garnishment suit is pending, issue execution on his judgment, and levy on whatever property of the defendant he can find;⁵ or may have still other persons summoned as garnishees, and pursue all these remedies *pari passu*;⁶ or prosecute subsequent garnishments against the same garnishee;⁷ or have garnishment issued in aid of a suit to enforce a log lien;⁸ or maintain garnishment, although he may have other security.⁷

Nothing Discharged till Actual Payment.

§ 186. The fact that enough property has been attached by any one of these proceedings to satisfy the plaintiff's whole demand is no reason for dismissing any of the others till the judgment is actually satisfied, though it might be cause for stay of judgment in the other suits, on proper application therefor.⁸ A

⁵ *Sutton v. Hasey*, 58 Wis. 556, 17 N. W. 416; But see *Roberts v. Landecker*, 9 Cal. 262.

⁶ *State Sav. Bank v. Wayne Circuit Judge*, 95 Mich. 100, 54 N. W. 632; *Pratt v. Young*, 90 Ga. 39, 15 S. E. 630; *Ahrens & Ott Manuf'g Co. v. Patton Sash, Door & Building Co.*, 94 Ga. 247, 21 S. E. 523.

⁷ *Lawrence v. Security Co.*, 56 Conn. 423, 15 Atl. 406.

⁸ *O'Reilly v. Milwaukee & N. Ry. Co.*, 68 Wis. 212, 31 N. W. 485.

The lien given by statute to innkeepers upon the wages of guests cannot be enforced by garnishment. *Rischert v. Kunz*, 9 Mo. App. 283.

⁷ *Germania Sav. Bank v. Peuser*, 40 La. Ann. 796, 5 South. 75.

DISMISSAL OF GARNISHMENT TO ATTACH: The creditor who has attached property by garnishment may dismiss the garnishment proceedings, and seize the garnished property under an attachment writ, and the garnishee cannot set up the garnishment proceedings to defeat the attachment; for, by attaching, the creditor released the garnishee from personal liability. *Toledo Sav. Bank v. Johnston* (Iowa) 62 N. W. 748.

⁸ *Sutton v. Hasey*, 58 Wis. 556, 564, 17 N. W. 416.

Held that, when an excessive number of garnishees are summoned,

creditor's claim is not satisfied by a fruitless garnishment, although the defendant thereby forever loses his demand against the garnishee by the insolvency of the latter, for the garnishment does not absolve the defendant's duty to pay, by which he could at any time dissolve the garnishment;⁹ but a payment of the money into court by the garnishee operates as an immediate payment upon the judgment in the main action, and discharges the judgment pro tanto, although the officer receiving the money absconds with it, and the plaintiff never receives any of it.¹⁰

Aid of Equity.

§ 187. Ordinarily, the aid of a court of equity cannot be invoked by either plaintiff,¹¹ defendant,¹² claim-

the court should require the plaintiff to elect which he will pursue, and order the proceedings against the rest dismissed. *Gilmore v. Miami Bank*, 3 Ohio, 503.

⁹ *Brice v. Carr*, 13 Iowa, 599; *Dickinson v. Clement*, 87 Va. 41, 12 S. E. 105.

¹⁰ *In re Dawson*, 110 N. Y. 114, 17 N. E. 668, affirming 47 Hun, 634.

¹¹ *Judah v. Judd*, 1 Conn. 309; *Gager v. Watson*, 11 Conn. 168; *Kimball v. Lee*, 43 N. J. Eq. 277, 10 Atl. 285; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 241, and 15 Atl. 298.

Plaintiff cannot supplement his garnishment by injunction against the principal defendant, *Carr v. Lee*, 44 Ga. 376; *Arthur v. Batte*, 42 Tex. 159; nor by a bill in the nature of a creditors' bill to set aside a fraudulent conveyance to the garnishee, *Thurber v. Blanck*, 50 N. Y. 80; *Godding v. Pierce*, 13 R. I. 532; *Bigelow v. Address*, 31 Ill. 322; nor by a bill for an accounting between the garnishee and the de-

¹² *Reeves v. Cooper*, 12 N. J. Eq. 223; *Eberhart v. Gilchrist*, 11 N. J. Eq. 167.

A statute of Connecticut allows the defendant to transfer the action to the equity court by bill of interpleader, and the filing and service of such bill suspends the action at law. *Darrow v. Adams Express Co.*, 41 Conn. 525.

ant,¹³ or garnishee,¹⁴ to make effectual, or obtain relief, from garnishment proceedings at law, especially in the absence of any showing that the complainant is without fault, and has exhausted his remedy at law, or has none.¹⁵ The remedy can be pursued only according to the appointment of the statute.¹⁶ But, in many cases in which garnishment could not be maintained at law, the same benefits may be acquired by

defendant, *Treadwell v. Brown*, 43 N. H. 290; nor when the plaintiff has an adequate and complete remedy under the garnishment statute. See post, § 331.

The plaintiff cannot, on showing that the garnishee is insolvent, have an injunction to restrain the debtors of the latter from paying their debts to him. *Wolf v. Tappan*, 5 Dana (Ky.) 361.

Held, that a bill for the benefit of all creditors of the defendant in attachment is maintainable. *Falconer v. Freeman*, 4 Sandf. Ch. 565.

When the plaintiff has secured a condemnation of an equitable interest, he will be in a position to claim the aid of equity to make it available, but not before. *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298; *White v. Simpson* (Ala.) 18 South. 151.

¹³ *Baldwin v. Wayne Circuit Judge*, 101 Mich. 432, 59 N. W. 669.

¹⁴ See post, §§ 191, 386. But compare post, § 331.

Garnishee is entitled to injunction perpetually restraining plaintiff from collecting a judgment to which garnishee has acquired a complete defense since it was rendered. *Cottrell v. Varnum*, 5 Ala. 229, 39 Am. Dec. 323.

Garnishee may have injunction pending the garnishment to restrain enforcement of judgment on which he owes defendant. *Gager v. Watson*, 11 Conn. 168.

The maker of a note may, as garnishee, have a bill of interpleader between the plaintiff and an alleged indorsee without notice of the garnishment. *Briant v. Reed*, 14 N. J. Eq. 271; *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330.

¹⁵ *Id.*

¹⁶ See ante, §§ 6, 13; *Godding v. Pierce*, 13 R. I. 532; *Thurber v. Blanck*, 50 N. Y. 80. But see *Conover v. Ruckman*, 33 N. J. Eq. 303; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341.

Only legal, as distinguished from equitable, claims are, ordinarily, liable to garnishment. See ante, § 154.

bill in equity without garnishment;¹⁷ and in garnishment at law a court of equity will interfere, and restrain a garnishee from fraudulently putting the property in his hands beyond the reach of the plaintiff.¹⁸

Concurrent Garnishments of Same Fund.

Priority Depends on Date of Service—Effect of Failure or Satisfaction of Prior Garnishment.

§ 188. Where there are several garnishments against the same property or fund in favor of different creditors, they take priority in the direct order of time of service of summons upon the garnishee,¹⁹ and

¹⁷ Earle v. Grove, 92 Mich. 285, 52 N. W. 615; Forrest v. Price, 52 N. J. Eq. 16, 29 Atl. 215; Pendelton v. Perkins, 49 Mo. 565.

A. recovered judgment against B. C. was indebted to B., and D. to C. Held, that the plaintiff could not, in equity, subject the amount due by D. to C. to the payment of his judgment against B. Jones v. Huntington, 9 Mo. 249.

¹⁸ See post, § 193; Malley v. Altman, 14 Wis. 22; Almy v. Platt, 16 Wis. 169; Bragg v. Gaynor, 85 Wis. 468, 481, 55 N. W. 919, 923; Moore v. Kidder, 55 N. H. 488; Candee v. Penniman, 32 Conn. 228. But see Kimball v. Lee, 43 N. J. Eq. 277, 10 Atl. 285; Bigelow v. Andress, 31 Ill. 322.

¹⁹ Wilder v. Weatherhead, 32 Vt. 765; McCobb v. Tyler, 2 Cranch, C. C. 199, Fed. Cas. No. 8,705; Johnson v. Griffith, 2 Cranch, C. C. 199, Fed. Cas. No. 7,386; Johann v. Rufener, 32 Wis. 195; Dorestan v. Krieg, 66 Wis. 604, 613, 29 N. W. 576; Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501; Warren v. Matthews, 96 Ala. 183, 11 South. 285; Gomila v. Milliken, 41 La. Ann. 116, 5 South. 548; Talbot v. Harding, 10 Mo. 350; Pritchard v. Toole, 53 Mo. 356.

PRIORITY BETWEEN GARNISHING CREDITORS AND OTHERS: The same rule of priority applies between an attaching and a garnishing creditor. Starr v. Tracy, 2 Root (Conn.) 528; Parker v. Kinsman, 8 Mass. 486; Burlingame v. Bell, 16 Mass. 318; Swett v. Brown, 5 Pick. (Mass.) 178; Platt v. Brown, 16 Pick. (Mass.) 553; Reed v. Fletcher, 24 Neb. 435, 39 N. W. 437, 447; Grand Island Banking Co. v. Costello, 43 Neb. 119, 63 N. W. 376; Shaver Wagon & Car-

not in the order of issuance of the writs,²⁰ or the rendering of the judgments.²¹ Each successive garnish-

riage Co. v. Halsted, 78 Iowa, 730, 43 N. W. 623; Buck-Renier Co. v. Beatty, 82 Iowa, 353, 48 N. W. 96; Barton v. Spencer (Okla.) 41 Pac. 605; Focke v. Blum, 82 Tex. 436, 17 S. W. 770; Erskine v. Staley, 12 Leigh (Va.) 406; Wynne v. State Nat. Bank, 82 Tex. 378, 17 S. W. 918.

And between a garnishing creditor and a creditor by bill in equity. Citizens' Bank of Wichita v. Farwell, 11 C. C. A. 108, 63 Fed. 117; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354; Scott v. Windham (Miss.) 16 South. 206; Monroe v. Lewald, 107 N. C. 655, 12 S. E. 287.

And between a garnishing creditor and a creditor claiming under a mechanic's lien. Dorestan v. Krieg, 66 Wis. 604, 612, 29 N. W. 576; Cahoon v. Levy, 6 Cal. 296; Bell v. Burke, 89 Ga. 772, 15 S. E. 705; McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948; McCullom v. Richardson, 2 Handy (Ohio) 274. Contra, Laws Mich. 1893, Act No. 199, § 9.

When a creditor of a partnership sues the same, and garnishes a debtor of one of the partners, and afterwards a creditor of that partner summons the same debtor as garnishee, the same rule applies. Stevens v. Perry, 113 Mass. 380.

"The law favors the diligent creditor, and will suffer no interference by one who has slept on his rights, for the purpose of taking from him the fruits of his superior diligence." *Cook v. Dillon*, 9 Iowa, 407, 414, 74 Am. Dec. 354.

After a sheriff had taken property under a writ of attachment, and delivered it to a person, to be returned on demand, taking his receipt therefor, the receptor leased the property of the owner, the principal defendant, and was thereafter summoned as garnishee of such defendant in another suit, after which the sheriff retook the property under his receipt, and levied another attachment upon it in favor of another creditor. Held, that the garnishing creditor's rights were prior to the second attachment. *Bank of Middlebury v. Edgerton*, 30 Vt. 182.

IN ILLINOIS, all attaching and garnishing creditors share pro rata by statute. *Reeve v. Smith*, 113 Ill. 47.

IN VERMONT, the rule is the same. *Bird v. Taylor*, 43 Vt. 584.

SIMULTANEOUS GARNISHMENTS share pro rata. *Guilford v. Reeves* (Ala.) 15 South. 661.

²⁰ *McCobb v. Tyler*, 2 Cranch, C. C. 199, Fed. Cas. No. 8,705; *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501.

²¹ *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

ment takes whatever is left on satisfaction of its predecessors, or enough to satisfy the judgment or demand in the suit in which it is issued, if there be so much;²² and if the prior garnishment absorbs the whole fund subsequent garnishments take nothing.²³ If a prior garnishment fails for any reason, or the defendant pays the judgment on which it is issued, the succeeding garnishments take its place, moving forward in their order, and the plaintiffs therein acquire the same rights as if such prior garnishment had never been made;²⁴ and if the plaintiff, in any prior suit, fails to prosecute it to judgment, as required by law to make it effectual, and the garnishee nevertheless pays him the money without, he will still be liable for the full amount to the junior garnishors, for their rights depend upon the defendant's, and his can be cut off only by performing the requirements of the statute.²⁵

²² *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. 915; *First Nat. Bank v. Brainerd*, 28 Fed. 917; *Guilford v. Reeves* (Ala.) 15 South. 661.

²³ *Garity v. Gigie*, 130 Mass. 184.

²⁴ *Mortland v. Little*, 137 Mass. 342; *Sheffield v. Barber*, 14 R. I. 263; *The Olivia A. Carrigan*, 7 Fed. 507. Compare *Patrick v. Mon-trader*, 13 Cal. 435; *Daniels v. Meinhard*, 53 Ga. 359.

²⁵ *Wilder v. Weatherhead*, 32 Vt. 765; *Cole v. Wooster*, 2 Conn. 203; *Bullard v. Randall*, 1 Gray (Mass.) 605, 61 Am. Dec. 433.

When the garnishee, at the defendant's request, and for the purpose of ending the litigation, agrees to pay the plaintiff's demand, which is less than the garnishee's debt, the arrangement cannot be defeated, and the garnishee charged, in disregard of it, by a garnishment served after that agreement is made. *Rudd v. Paine*, 2 Cranch, C. C. 9, Fed. Cas. No. 12,108.

Remedies of Subsequent against Prior Garnishing Creditors.

§ 189. The rule that each garnishment must await the outcome of those preceding it, and can take only from what they leave, affords great inducement to dishonest debtors to seduce and connive with the first garnishing creditor to embarrass, hinder, and defraud those creditors prosecuting subsequent garnishments, or even to institute fictitious suits for the purpose of defeating anticipated garnishments. What remedies has a creditor who suspects that a prior proceeding against the garnishee in his suit is instituted or conducted in collusion with the principal defendant, for the purpose of defrauding him? It would hardly seem to be the proper practice to require the prior creditor to intervene as a claimant in the subsequent garnishment suit, and it has been held that he cannot be thus compelled to try his suit in the bowels of another.²⁶ Moreover, it has been held that the subsequent garnishing creditor has no standing to intervene as a claimant in the prior suit.²⁷ But, inasmuch as this is the most summary and effectual means of defeating such attempts to perpetrate frauds by a perversion of legal process, and is attended with as little expense and inconvenience as any other means of justice, it is to be hoped that these decisions will not be followed. It is believed that, upon principle and authority, in the absence of statute, a subsequent garnishing creditor may intervene in the prior suit, to show that it is operated as a fraud upon him, and se-

²⁶ Cross v. Brown (R. I.) 33 Atl. 147, 158.

²⁷ Cross v. Brown, 17 R. I. 568, 23 Atl. 761; Abernathy v. Whitehead, 69 Mo. 28.

cure such a disposition of the case as will save his rights,²⁸ or, at his option, prosecute a suit in equity for the same purpose.²⁹

Other Garnishments—How Pleaded as Defense.

§ 190. The garnishee cannot plead, in abatement of the proceedings against him as such, that, prior to the commencement of such garnishment, he had been summoned as garnishee, in respect of the same debt or property, in a suit or suits in favor of other creditors of the same defendant, which are still pending, al-

²⁸ *Blaisdell v. Ladd*, 14 N. H. 129.

In Vermont, the statute authorizing such intervention in attachment cases was construed by its spirit, and extended to proceedings by trustee process. *Harding v. Harding*, 25 Vt. 487. Held, that subsequent attaching creditors may intervene to impeach the good faith of previous attachments. *Buckman v. Buckman*, 4 N. H. 319; *McCluny Co. v. Jackson*, 6 Grat. (Va.) 96; *Hale v. Chandler*, 3 Mich. 531; *Smith v. Gettinger*, 3 Ga. 140; *Jacobs v. Hogan*, 85 N. Y. 243.

Contra, *Ward v. Howard*, 12 Ohio St. 158; *Whipple v. Cass*, 8 Iowa, 126. For an extended review of the decisions on fraudulent attachments, see *Drake*, *Attachm. c.* 11.

"The obtaining of the jurisdiction is one of the effects of the service on the garnishee; but, if that service becomes of 'no effect from the beginning,' how can it be said that the jurisdiction remains? Such a holding is directly in the teeth of the plain words of the statute. * * * We entertain no doubt of the right of a creditor who has obtained an interest or lien upon the property by subsequent garnishment to raise the question." *Globe Milling Co. v. Boynton*, 87 Wis. 612, 632, 59 N. W. 132.

For the purpose of showing that a debt, for which the garnishee has given his note payable to the order of a third person, who has brought suit thereon against the garnishee, in fact belongs to the defendant, the garnishing creditor may intervene in such suit. *Capera v. Mignon* (Tex. Civ. App.) 33 S. W. 882.

²⁹ *Hale v. Chandler*, 3 Mich. 531; *Patrick v. Montrader*, 13 Cal. 435; *Whipple v. Cass*, 8 Iowa, 126.

though in another jurisdiction;³⁰ nor that suits previously commenced are pending against him by persons other than the defendant, who claim to own the property.³¹ In either of these cases the garnishee should set up the facts fully in his answer, and thereupon the court will, upon his motion, grant a stay of proceedings till such prior suits are disposed of.³² If

³⁰ *Warren v. Matthews*, 96 Ala. 183, 11 South. 285; *Guilford v. Reeves* (Ala.) 15 South. 661; *Prentiss v. Danaher*, 20 Wis. 311; *Carrow v. McDonogh*, 10 Mart. (La.) 609; *Woodruff v. French*, 6 La. Ann. 62; *The Olivia A. Carrigan*, 7 Fed. 507. And compare *Bates v. Days*, 17 Fed. 167.

"Should it be made to appear but a single cause of action was involved, notwithstanding there are different plaintiffs, the court, no doubt, on motion of the garnishee, would consolidate the several suits into one action. In this way one verdict would be conclusive of the whole subject-matter of the litigation." *Imperial Fire Ins. Co. v. Gunning*, 81 Ill. 236.

The court making the first garnishment may require the property to be paid into court, and will guard the rights of subsequent garnishing creditors who have sued in other courts. *The Olivia A. Carrigan*; 7 Fed. 507. Compare *State ex rel. Austrian v. Duncan*, 37 Neb. 631, 56 N. W. 214.

³¹ *Graham v. Chappell*, 24 Wis. 38; *Graham v. O'Neil*, Id. 34; *Johann v. Rufener*, 32 Wis. 195.

³² *Williams v. Housel*, 2 Iowa, 154; *Prentiss v. Danaher*, 20 Wis. 311, 318; *Danaher v. Prentiss*, 22 Wis. 317; *Guilford v. Reeves* (Ala.) 15 South. 661; *Brickey v. Davis*, 9 Ill. App. 362; *Cutter v. Perkins*, 47 Me. 557; *Dittenhoefer v. Cœur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Woodruff v. French*, 6 La. Ann. 62; *Work v. Brown*, 38 Neb. 498, 56 N. W. 1082; *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. 915; *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 389.

But if the fund in the garnishee's hands is more than enough to satisfy all judgments that can possibly be rendered against him, there is no cause for a stay. *Warren v. Matthews*, 96 Ala. 183, 11 South. 285.

The giving of a bond of indemnity to the garnishee will not entitle

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the subsequent garnishor insists, as he has a right to do, upon having his case disposed of without waiting for the outcome of the one preceding it, the court should discharge the garnishee.³³

Double Liability from Improper Defense.

§ 191. It is very important that he should make such defense in the proper time and manner, for, if he wait till issue is formed on his answer, and attempt to give the matter in evidence on the trial, it will be rejected;³⁴ and, if judgment pass against him in the junior garnishment, he will, nevertheless, be liable for the full amount to the plaintiff whose garnishment was first served,³⁵ unless he has, without avail, used all legal means to prevent liability in the junior suit.³⁶ If he fail to make the defense in the proper manner in

the junior garnishor to immediate judgment. *Ash v. Aiken*, 2 Tex. Civ. App. 83, 21 S. W. 618.

When the same creditor began a second garnishment, held, that the garnishee should move to have it set aside, basing the motion on the first. *Lomerson v. Hoffman*, 24 N. J. Law, 674.

³³ *Cross v. Brown* (R. I.) 33 Atl. 147.

³⁴ *Prentiss v. Danaher*, 20 Wis. 311, 318; *Schuerman v. Foster*, 82 Wis. 322, 52 N. W. 311; *Lomerson v. Hoffman*, 24 N. J. Law, 674.

³⁵ *Johann v. Rufener*, 32 Wis. 195; *Prentiss v. Danaher*, 20 Wis. 311; *Koyer v. Fleming*, 58 Mo. 438. 'Compare Farmers' Bank v. Beaton, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

³⁶ *Eddy v. O'Hara*, 132 Mass. 56; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 20 Johns. 229, and 11 Am. Dec. 269.

Judgment having been passed against him in the junior suit, and he having taken it to the higher court by certiorari, where it was affirmed, the Wisconsin court held that he had not used all legal means, because appeal was more efficient. *Johann v. Rufener*, 32 Wis. 195.

Held, that garnishee may notify plaintiff of subsequent suits against him by claimants, and require the plaintiff to defend them; and, having done this, the plaintiff would be bound by any judgment

the junior suit, and allow judgment to pass against him in both, he is without remedy, either at law or in equity, and must pay both judgments. Interpleader will not lie.³⁷

rendered in the subsequent suit. *Butler v. Wendell*, 57 Mich. 62, 68, 23 N. W. 460.

³⁷ *Danaher v. Prentiss*, 22 Wis. 311; *Houston v. Walcott*, 7 Iowa, 173; *Burlington & M. R. Ry. Co. v. Hall*, 37 Iowa, 620; *Yarborough v. Thompson*, 11 Miss. 291, 61 Am. Dec. 626.

CHAPTER VIII.

EFFECT OF GARNISHMENT AS AN ATTACHMENT.

- § 192. The Service of the Garnishment Attaches the Property or Debt.
193. Creates a Specific Lien.
194. Places Property in Custodia Legis.

**The Service of the Garnishment Attaches the
Property or Debt.**

§ 192. Garnishment is a mode of attachment,¹ a seizure by notice,² which operates as an equitable levy,³ but not as an assignment.⁴ Service of the summons on the garnishee renders him liable to the plain-

¹ American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 56 N. W. 711; Bethel v. Judge of Superior Court, 57 Mich. 379, 381, 24 N. W. 112; Woodward v. Adams, 9 Iowa, 474; Teague v. Le Grand, 85 Ala. 493, 5 South. 287; State Nat. Bank v. Boatner, 39 La. Ann. 843, 2 South. 589; Nelson v. Sanborn, 64 N. H. 310, 9 Atl. 721; Tweedy v. Bogart, 56 Conn. 419, 15 Atl. 374; Cousens v. Lovejoy, 81 Me. 467, 17 Atl. 495.

² Beamer v. Winter, 41 Kan. 596, 21 Pac. 1078; Barton v. Spencer (Okl.) 41 Pac. 605.

³ Winner v. Hoyt, 68 Wis. 278, 32 N. W. 128; Globe Milling Co. v. Boynton, 87 Wis. 619, 59 N. W. 132; Moore v. Kelley, 47 Ark. 219, 1 S. W. 97.

⁴ WHETHER AN ASSIGNMENT: "The service of the garnishment neither changed nor interrupted the contractual relations existing. * * * The legal operation and the effect of the garnishment proceedings, and the final order therein made, were only to impound what was legally and equitably due from the garnishee. * * * The claim made by the appellee that the garnishment service operated as an equitable assignment to the garnishor of the due indebtedness from the garnishee cannot be sustained, either upon reason or authority. The final order in that proceeding does not have the legal effect of transferring the Chicago company's due indebtedness." North Chi-

tiff, from the time of service, for the value of all the defendant's property in the hands of the garnishee and the amount of all debts owing by him to the defendant at the time of service;⁵ and he cannot escape liability to the plaintiff therefor by afterwards delivering or paying it to the defendant or any one else,⁶ or allowing it to escape from his control,⁷ even though taken by an

icago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 716, citing *Chatterton v. Watney*, 17 Ch. Div. 259, and *In re Combined Weighing & Advertising Mach. Co.*, 43 Ch. Div. 99. See, also, *Meriam v. Rundlett*, 30 Mass. 511; *Yazoo & M. V. Ry. Co. v. Fulton*, 71 Miss. 385, 14 South. 271.

CONTRA: "The trustee process operates as a species of compulsory statutory assignment, by which a creditor may obtain that by operation of law which his debtor might voluntarily assign to him in payment of his debt." *Strong v. Smith*, 1 Metc. (Mass.) 476; *Steele v. Norton*, 45 Wis. 412, 414; *Secor v. Witter*, 39 Ohio St. 218, 231; *Als-dorf v. Reed*, 45 Ohio St. 653, 17 N. E. 73; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *Campbell v. Nesbitt*, 7 Neb. 300.

⁵ *Maynards v. Cornwell*, 3 Mich. 309, 311; *Kennedy v. Brent*, 6 Cranch, 187; *Secor v. Witter*, 39 Ohio St. 218, 229; *Als-dorf v. Reed*, 45 Ohio St. 653, 17 N. E. 73; *Western Ry. Co. v. Thornton*, 60 Ga. 300, 306; *Dorestan v. Krieg*, 66 Wis. 604, 613, 28 N. W. 576; *Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. 721; *Roberts v. Landecker*, 9 Cal. 267; *St Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Moore v. Kelley*, 47 Ark. 219, 1 S. W. 97.

⁶ *Gibson v. National Park Bank*, 98 N. Y. 87, 95; *First Nat. Bank v. Turner*, 30 Neb. 80, 46 N. W. 290; *Tindell v. Wall*, Busb. (N. C.) 3; *Farrell v. Pearson*, 26 Ill. 463; *Stevens v. Dillman*, 86 Ill. 233; *Kesler v. St. Johns*, 22 Iowa, 565; *Hughes v. Monty*, 24 Iowa, 499; *Toledo, W. & W. Ry. Co. v. McNulty*, 34 Ind. 531; *Johnson v. Carry*, 2 Cal. 33; *Wilder v. Weatherhead*, 32 Vt. 765; *Sargent v. Wood*, 51 Vt. 697; *Locke v. Tippetts*, 7 Mass. 149; *West v. Platt*, 116 Mass. 308; *Mason v. Crabtree*, 71 Ala. 479; *Lady Ensley Furnace Co. v. Rogan*, 95 Ala. 594, 11 South. 188.

⁷ *Trunkey v. Crosby*, 33 Minn. 464, 23 N. W. 846; *First Nat. Bank v. Davenport Ry. Co.*, 45 Iowa, 126; *Stedman v. Vickery*, 42 Me. 132; *Aldrich v. Woodcock*, 10 N. H. 99; *Loyless v. Hodges*, 44 Ga. 647;

adverse claimant by virtue of legal process,⁸ unless he has exhausted all legal means to prevent it, and without avail.⁹

Creates a Specific Lien.

§ 193. Garnishment is a direct proceeding against the debt or assets of the principal defendant in the hands of the garnishee, and though, technically speaking, it may not give a "specific lien" upon such indebtedness, its effect, in most states at least, in conferring upon the plaintiff a specific right, over and above that of a mere general creditor, to the indebtedness for the payment of his claim, is substantially analogous to that acquired by an attachment of tangible property;¹⁰ and, in case the garnishee is liable for specific

Derpatch Line v. Bellamy Manuf'g Co., 12 N. H. 205; *Cottrell v. Var-num*, 5 Ala. 229, 39 Am. Dec. 323.

⁸ *Calhoon v. Whittle*, 56 Ala. 138; *Johann v. Rufener*, 32 Wis. 195, 198; *Mobile & O. Ry. Co. v. Whitney*, 39 Ala. 468; *McCown v. Russell*, 84 Wis. 122, 128, 54 N. W. 31; *Locke v. Tippetts*, 7 Mass. 149; *Parker v. Kinsman*, 8 Mass. 436; *Trombly v. Clark*, 13 Vt. 118; *Home Mut. Ins. Co. v. Gamble*, 14 Mo. 407. Compare *Ronan v. Dewes*, 17 Mo. App. 306.

⁹ *Johann v. Rufener*, 32 Wis. 195, 198; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 20 Johns. (N. Y.) 229, and 11 Am. Dec. 269; *Wheeler v. Winn*, 38 Vt. 122. Compare *Eddy v. O'Hara*, 132 Mass. 56; *Hooper v. Benson*, 1 Root (Conn.) 545; *Booth v. Gish*, 75 Iowa, 451, 39 N. W. 704.

¹⁰ *North Star Boot & Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. 334; *Hawes v. Mooney*, 39 Conn. 37; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *White v. Simpson* (Ala.) 18 South. 151; *Hacker v. Stevens*, 4 McLean, 535, Fed. Cas. No. 5,887; *Tindell v. Wall*, Busb. (N. C.) 3; *Wallace v. McConnell*, 13 Pet. 136, 150.

Whatever security the defendant had for the enforcement of payment of the debt, the plaintiff acquires. See ante, § 127.

"The trustee process is sometimes called 'attaching a debt,' because it creates a lien upon the debt, as attachment does upon per-

property of the defendant in his possession, the lien acquired by the plaintiff, at least in most states, would seem to be almost, if not quite, as complete as if the property were actually in the hands of the sheriff.¹¹

sonal property. But the validity of the two kinds of lien rests on wholly different grounds. Attachment of personal property must be by taking possession of it, but no possession can be taken of a debt. To make the lien valid against the debt, all that is required is notice to the debtor." *Cahoon v. Morgan*, 38 Vt. 234, 236.

DISTINCTION BETWEEN GARNISHMENT OF PROPERTY AND OF A DEBT: Shaw, C. J.: "The trustee process, provided for by statute, manifestly contemplates two distinct classes of cases in which a creditor may avail himself of its provisions to secure his debt by attaching property in the hands of a third person: The one, when the trustee has in his custody or under his control goods or chattels liable by law to be attached on mesne process by the ordinary writ of attachment; the other, where the trustee is a debtor to the principal defendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day. * * * This distinction is founded on the statute rendering goods and credits, respectively, liable to attachment. In the former case, the attachment binds the goods specifically, creates a lien upon them of the same nature and to the same extent as an ordinary attachment on mesne process, although the goods are to stand charged in the hands of the trustee, so that the custody remains with the trustee, instead of being taken by the attaching officer, unless a subsequent attachment is made by another creditor, which may be done, subject to the first attachment." *Allen v. Hall*, 5 Metc. (Mass.) 263.

"However it may be with specific property in the hands of the garnishee, our conclusion is that garnishment does not give the creditor any lien upon a debt owing by the garnishee to the debtor in the action, nor upon any money or property with which he may afterwards pay it." *Hulley v. Chedic* (Nev.) 36 Pac. 783.

¹¹ *Barton v. Spencer* (Okl.) 41 Pac. 605; *Bushman v. Hanna*, 72 Md. 1, 18 Atl. 962; *Bryan v. Lashley*, 21 Miss. 284; *Bethel v. Judge of Superior Court*, 57 Mich. 379, 381, 24 N. W. 112; *Banning v. Sibley*, 3 Minn. 389 (Gil. 282, 297); *Wilder v. Weatherhead*, 32 Vt. 765; *Tillinghast v. Johnson*, 5 Ala. 514; *Martin v. Foreman*, 18 Ark. 249; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *Beaumont v. Eason*,

The garnishee may be ordered to deliver the property into court,¹² or enjoined from disposing of it, and pun-

12 *Heisk. (Tenn.)* 417, 421; *Blaisdell v. Ladd*, 14 N. H. 129; *Bailey v. Ross*, 20 N. H. 302; *Walcott v. Keith*, 22 N. H. 196.

A personal judgment against the garnishee would not afford the full benefit intended to be conferred by the statute; "that is, the right to pursue the property and have it applied to the satisfaction of his debt. If the right to recover such judgment were the only remedy, an irresponsible person, in possession of the debtor's property, might dispose of it, and leave the creditor only a worthless judgment against him." *Carter v. Koshland*, 13 Or. 615, 12 Pac. 58.

A garnishee in possession of defendant's property has no right to make himself a debtor by disposing of the property, and compelling creditors to take a merely personal judgment against him. *Shaver Wagon & Carriage Co. v. Halsted*, 78 Iowa, 730, 43 N. W. 623.

A LEVY CREATES A LIEN—A GARNISHMENT DOES NOT:

"In the one case, a lien is created upon the property. In the other, a personal obligation and liability may be established against the one holding the property. In the one case, the property itself is taken to satisfy the creditor's claim. In the other, the personal liability of the garnishee stands in lieu of the property. If the creditor be successful in the one case, his claim is paid by sale of the property so taken. In the other, he looks to the one whom the law holds liable for the value of the property in his hands. In either case, the liability primarily arises because of the existence of property in fact owned by the debtor. In one case, a specific lien is created by levy or attachment. In the other, while no lien is created upon or attaches to the property itself, yet the effect, of the garnishment, is to confer upon the creditor a right to the payment of his claim, by reason of the indebtedness existing from the garnishee to the defendant, or because of the garnishee's having in his possession property of the defendant." *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89 Iowa, 618, 57 N. W.

¹² *Johann v. Rufener*, 32 Wis. 195, 198; *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S. W. 81. See, also, post, § 317.

Contra, as to property in mortgagee's hands. *McConnell v. Denham*, 72 Iowa, 494, 34 N. W. 298.

ABANDONED PROPERTY: The court may appoint a suitable person to take charge, and, if necessary, dispose of specific property attached by garnishment and abandoned by the garnishee after he is served. *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635, 39 N. W. 788.

ished for contempt if he disobeys.¹³ After recovering judgment, the plaintiff may maintain an action on the

444. For similar expressions, the reader is referred to the following decisions: *Mooar v. Walker*, 46 Iowa, 164; *McConnell v. Denham*, 72 Iowa, 494, 34 N. W. 298; *Clark v. Raymond*, 86 Iowa, 661, 53 N. W. 354; *Maish v. Bird*, 48 Fed. 607; *Moore v. Holt*, 10 Grat. (Va.) 284.

"It is true that, by the garnishment of appellant, and said order of court, the plaintiffs did not acquire a lien upon the securities [insurance policies, notes, and books of account] in appellant's hands; but they certainly did acquire such an interest therein as entitles them to an accounting as to all of said securities." *McDonald v. Creager* (Iowa) 65 N. W. 1021.

On the ground that garnishment creates no lien on specific property, it was held, in Illinois, that a court of equity will not intervene, by way of injunction or otherwise, to preserve the property in the garnishee's hands, and that the plaintiff is only entitled to a personal judgment against the garnishee. *Bigelow v. Andress*, 31 Ill. 322.

Upon the ground that garnishment creates no lien upon specific property of the defendant in the garnishee's hands, it has been held that service of the garnishment process does not prohibit the garnishee from disposing of the property, but only renders him personally liable for a misappropriation, or failure to produce the property to satisfy the judgment which may be rendered in the cause; and, therefore, one obtaining the property for value from the garnishee, and without knowledge of the garnishment, acquires a valid title against the garnishing creditor, and is not liable to him in trover. *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S. W. 81. See, also, *Walcott v. Keith*, 22 N. H. 196.

A subsequent attachment will not defeat the garnishment. *Buck-Renier Co. v. Beatty*, 82 Iowa, 353, 48 N. W. 96. See, also, ante, § 188. Compare *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501.

¹³ *Johann v. Rufener*, 32 Wis. 195, 198; *Mally v. Altman*, 14 Wis. 22; *Almy v. Platt*, 16 Wis. 169; *Bragg v. Gaynor*, 85 Wis. 468, 481, 55 N. W. 919, 923; *Lillienthal v. Wallach*, 37 Fed. 241.

Held, that the injunction should be dissolved, when it is made to appear that the garnishee is amply solvent. *Sweet v. Oliver*, 56 Iowa, 744, 10 N. W. 275.

The plaintiff cannot have writ of ne exeat to prevent the garnishee leaving the state. *Patterson v. Bowie*, 1 Cranch, C. C. 425, Fed. Cas. No. 10,825.

case against one who took the property from the garnishee and converted it to his own use while the garnishment was pending.¹⁴ Of course, the summoning of a garnishee as debtor does not create any lien on any of his specific property.¹⁵

Places Property in Custodia Legis.

§ 194. By the weight of authority the service of the garnishment summons places the property in the garnishee's hands substantially in custodia legis,¹⁶ whereby the garnishee acquires special rights as agent of the court,¹⁷ and is entitled to hold the property until the question of his liability is determined, not only against

¹⁴ *Aderholt v. Smith*, 83 Ala. 486, 3 South. 794; *Reed v. Fletcher*, 24 Neb. 435, 39 N. W. 437; *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770. Contra, *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S. W. 81.

OTHER PROCEEDINGS BEFORE JUDGMENT: After service of the garnishment on an administrator before judgment in the main action, held, that the plaintiff is ostensibly interested in the accounting of the administrator with the orphans' court, and may therein oppose the allowance of the administrator's account. *Reese's Appeal*, 116 Pa. St. 272, 9 Atl. 315.

¹⁵ *Irwin v. McKechnie*, 58 Minn. 145, 59 N. W. 987.

¹⁶ *Brashear v. West*, 7 Pet. 608; *Mattingly v. Boyd*, 20 How. 128; *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635, 39 N. W. 788; *Mathews v. Smith*, 13 Neb. 178, 12 N. W. 821; *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *State v. Linaweaver*, 3 Head (Tenn.) 51; *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078; *Barton v. Spencer* (Okl.) 41 Pac. 605; *Renneker v. Davis*, 10 Rich. Eq. (S. C.) 289; *Biggs v. Kouns*, 7 Dana (Ky.) 405; *Carter v. Koshland*, 13 Or. 615, 12 Pac. 58. CONTRA, *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S. W. 81; *Maish v. Bird*, 48 Fed. 607; *Bigelow v. Andress*, 31 Ill. 322. But see *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572.

¹⁷ *Erskine v. Staley*, 12 Leigh (Va.) 406.

the defendant and those claiming under him,¹⁸ but even against the real owner, who is a stranger to the garnishment suit.¹⁹ The property cannot afterwards, while the suit is pending, be taken from him by attachment;²⁰ but, if this should be done wrongfully, or allowed, as it has been in Massachusetts, the plaintiff in attachment acquires no rights as against the plaintiff in the garnishment previously served,²¹ and the plaintiff in garnishment may sue and recover from the attachment plaintiff the value of the property taken.²²

¹⁸ *Gemberling v. Spaulding* (Mich.) 62 N. W. 342; *Walcott v. Keith*, 22 N. H. 196.

The garnishee may maintain an action against the defendant, who takes the property from him while the suit is pending, so that he cannot turn it over, and has to pay its value. *Deno v. Thomas*, 64 Vt. 358, 24 Atl. 140.

¹⁹ *Stiles v. Davis*, 1 Black (U. S.) 101; *Cooley v. Minnesota Transfer Ry. Co.*, 53 Minn. 327, 55 N. W. 141; *Van Ness v. McLeod*, 2 Idaho, 1147, 31 Pac. 798. Compare *Ash v. Aiken*, 2 Tex. Civ. App. 83, 21 S. W. 618. Contra, *Booth v. Gish*, 75 Iowa, 451, 39 N. W. 704.

²⁰ *Brashear v. West*, 7 Pet. 608; *Kendrick v. Boston & N. Y. C. Ry. Co.*, 3 R. I. 235; *Scholefield v. Bradlee*, 8 Mart. (La.) 495; *Dennistoun v. New York C. & S. F. Co.*, 6 La. Ann. 782; *Buck-Renier Co. v. Beatty*, 82 Iowa, 353, 48 N. W. 96; *Erskine v. Staley*, 12 Leigh (Va.) 406; *Grand Island Banking Co. v. Costello* (Neb.) 63 N. W. 376; *Barton v. Spencer* (Okla.) 41 Pac. 605.

²¹ *Burlingame v. Bell*, 16 Mass. 318; *Swett v. Brown*, 5 Pick. 178, 180; *Platt v. Brown*, 16 Pick. 553, 555; *Reed v. Fletcher*, 24 Neb. 435, 39 N. W. 437, 447; *Erskine v. Staley*, 12 Leigh (Va.) 406; *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *Grand Island Banking Co. v. Costello* (Neb.) 63 N. W. 376; *Barton v. Spencer* (Okla.) 41 Pac. 605. But see *Booth v. Gish*, 75 Iowa, 451, 39 N. W. 704.

²² *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *Reed v. Fletcher*, 24 Neb. 435, 39 N. W. 437, 447.

CHAPTER IX.

EFFECT OF GARNISHMENT AS A STAY OF OTHER PROCEEDINGS AGAINST THE GARNISHEE.

§ 195. What Actions are Stayed.

- 196. Manner of Pleading a Pending Garnishment—Cannot Abate a Prior Suit.
- 197. — Ground for Continuance on Motion.
- 198. — May be Pleading in Abatement of Subsequent Suit.
- 199. — Pending Garnishment cannot be Pleading in Bar, nor in Abatement—Ground Only for Stay.
- 200. — Form of Pleading not Strictly Regarded.
- 201. — Garnishment in Another Jurisdiction.

What Actions are Stayed.

§ 195. Some of the statutes provide that no suit shall be maintained or recovery had against the garnishee for the debt or property involved in the garnishment proceeding while the same is pending,¹ but the same rule is applied in proceedings under statutes containing no such provision.² The rule just stated does not operate to prevent actions against the garnishee by any person not a party to the garnishment proceed-

¹ Nash v. Gale, 2 Minn. 310 (Gil. 265); Brande v. Bond, 63 Wis. 140, 23 N. W. 101.

² Grosslight v. Crisup, 58 Mich. 531, 25 N. W. 505; Burt v. Wayne Circuit Judge, 82 Mich. 251, 46 N. W. 380; Gemberling v. Spaulding (Mich.) 62 N. W. 342; Mattingly v. Boyd, 20 How. 128; Embree v. Hanna, 5 Johns. (N. Y.) 101; Brook v. Smith, 1 Salk. 280.

The omission of the court to charge the garnishee upon rendering judgment against the defendant will not impair the garnishee's right to set up the garnishment as a defense. Howe v. Tefft, 15 R. I. 477, 8 Atl. 707.

ings and claiming adversely to the defendant therein,³ unless he has been notified to appear and defend his rights in the garnishment suit;⁴ nor by the defendant to recover property exempt from garnishment;⁵ nor to recover the excess of the garnishee's liability over what is necessary to satisfy the demands upon which the garnishment issued;⁶ nor for the recovery of property or debts not attached, such as those for which the garnishee has become liable since the commencement of the garnishment proceedings;⁷ nor by the defendant or his assignee to recover the garnished property after the garnishment is dismissed, although the garnishee has received no notice of such dismissal;⁸ nor does it prevent the plaintiff in garnishment at the same time prosecuting other remedies to reach other property, and have the same applied on his judgment;⁹ and a debtor cannot stay action against himself by suing his creditor upon another demand and summoning himself as garnishee.¹⁰

³ *McAuliffe v. Farmer*, 27 Mich. 76; *Mason v. Noonan*, 7 Wis. 609. Compare *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460.

⁴ *Rothschild v. Burton*, 57 Mich. 540, 25 N. W. 49.

⁵ See ante, § 95.

⁶ *Paul v. Roney*, 94 Ga. 133, 21 S. E. 283. See, also, ante, § 142.

⁷ *Nash v. Gale*, 2 Minn. 310 (Gil. 265).

⁸ *Paul v. Roney*, 94 Ga. 133, 21 S. E. 283.

⁹ See ante, § 185.

¹⁰ *New England Screw Co. v. Bliven*, 3 Blackf. (Ind.) 240.

Manner of Pleading a Pending Garnishment.

Cannot Abate a Prior Suit.

§ 196. At common law, although a prior suit for the same cause may be pleaded in abatement of a second, yet the subsequent suit could never be pleaded in abatement of the first; and for this reason one who has been sued by his creditor cannot plead, in abatement of the suit, the fact that, after it was commenced, he has been summoned as garnishee in an action against the plaintiff.¹¹

Ground for Continuance on Motion.

§ 197. In such cases the proper practice is to bring the fact of the garnishment to the attention of the court by motion, petition, plea, or plea puis darrein continuance, as the circumstances may require, whereupon the court will stay all proceedings before judg-

¹¹ Wood v. Lake, 13 Wis. 84.

"When the garnishee suit is subsequent in point of time to that of the principal defendant for the recovery of the debt, and before judgment, it is plain to be seen that the garnishee will be twice made liable for the debt unless he can bring these proceedings before the court by plea in abatement; and, to prevent such consequence, it is his duty to do so at any stage in the progress of the first suit, before judgment, and at the first opportunity. It can only be done by a plea puis darrein continuance, or by notice authorized by rule 106. * * * The plaintiff claims that great inconvenience will arise, as well as delay in the prosecution of the suit, by permitting a plea in abatement at this stage of the proceedings. But the statute has made provision by which such delay may be avoided, and the suit proceed, by the plaintiff's availing himself of section 8105, and filing the bond therein provided for, and thus secure a discontinuance of the garnishee proceedings." Grosslight v. Crisup, 58 Mich. 531, 25 N. W. 505.

ment, or allow judgment to be entered, with stay of execution, in whole or in part, as justice demands;¹² and if judgment has been rendered, execution will be stayed till the garnishment is disposed of.¹³

May be Pleaded in Abatement of Subsequent Suit.

§ 198. It has been held that the garnishment of a debtor is ground for abatement of a subsequent action against him by his creditor;¹⁴ and there are numerous cases in which the courts have declared that, under such circumstances, a plea in abatement is the proper manner of presenting the defense, and would be sustained.¹⁵

¹² Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310; Smith v. Carroll, 17 R. I. 125, 21 Atl. 343; Burt v. Wayne Circuit Judge, 82 Mich. 251, 46 N. W. 380.

"It is always possible that process of courts may be abused, and legal proceedings may be instituted for delay and annoyance; but we cannot try such issues by mandamus, or assume that such is the object or purpose of parties." Burt v. Wayne Circuit Judge, 82 Mich. 251, 46 N. W. 380.

¹³ Belcher v. Grubb, 4 Har. (Del.) 461; Gager v. Watson, 11 Conn. 168; Ulrich v. Hower, 156 Pa. St. 414, 27 Atl. 243; Allen v. Watt, 79 Ill. 284; Connor v. Hanover Ins. Co., 28 Fed. 549; Griffin v. Potter, 27 Mich. 166.

For further decisions on this subject, see ante, § 144.

¹⁴ Embree v. Hanna, 5 Johns. (N. Y.) 101; Brook v. Smith, 1 Salk. 280; Crawford v. Clute, 7 Ala. 157, 41 Am. Dec. 92, overruled in Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463.

¹⁵ Near v. Mitchell, 23 Mich. 382; Grosslight v. Crisup, 58 Mich. 531, 25 N. W. 505; Irvine v. Lumberman's Bank, 2 Serg. & R. (Pa.) 190; Fitzgerald v. Caldwell, 1 Yeates (Pa.) 274; Brown v. Summer-ville, 8 Md. 444; Clise v. Freeborne, 27 Iowa, 280; Ladd v. Jacobs, 64 Me. 347; Mars v. Virginia Home Ins. Co., 17 S. C. 514; Mattingly v. Boyd, 20 How. 128; Wallace v. McConnell, 13 Pet. 150; Cheong-wo v. Jones, 3 Wash. C. C. 359, Fed. Cas. No. 2,638; Haselton v. Monroe, 18 N. H. 598.

*Pending Garnishment cannot be Pleaded in Bar, nor in Abatement
—Ground Only for Stay.*

§ 199. Certainly, garnishment proceedings against a debtor do not, before judgment in the garnishment suit, bar the right of action by his creditor, but, at most, simply suspend it; for non constat that judgment will ever be rendered in the garnishment suit. Therefore, such proceedings are not ground for a plea in bar of the action by his creditors.¹⁶

And nearly every court to which the question has been squarely presented has held that it is not even ground for a plea in abatement,¹⁷ but only for a stay of proceedings, or continuance till the garnishment is disposed of; and the proper manner of bringing the facts to the attention of the court is by petition or motion for continuance, based on affidavits setting up all the material facts.¹⁸

¹⁶ *Near v. Mitchell*, 23 Mich. 382; *Clise v. Freeborne*, 27 Iowa, 280; *Irvine v. Lumberman's Bank*, 2 Serg. & R. (Pa.) 190; *Cheongwo v. Jones*, 3 Wash. C. C. 359, Fed. Cas. No. 2,638; *Pierson v. McCahill*, 21 Cal. 122; *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86; *Jones v. Wood*, 30 Vt. 268; *Hicks v. Gleason*, 20 Vt. 139; *Herlow v. Orman*, 3 N. M. 291, 6 Pac. 935; *Shealy v. Toole*, 56 Ga. 210; *McRee v. Brown*, 45 Tex. 503. But see *Wilson v. Murphy*, 45 Mo. 409.

¹⁷ *Winthrop v. Carlton*, 8 Mass. 456; *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463; *McFadden v. O'Donnell*, 18 Cal. 160; *Morton v. Webb*, 7 Vt. 123; *Wadleigh v. Pillsbury*, 14 N. H. 373; *Lynch v. Hartford Fire Ins. Co.*, 17 Fed. 627; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905. See, also, *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504; *Yazoo & M. V. Ry. Co. v. Fulton*, 71 Miss. 385, 14 South. 271; *McDonald v. Carney*, 8 Kan. 20; *Ferguson v. Kansas City Bank*, 25 Kan. 333. See ante, § 190.

¹⁸ *McKeon v. McDermott*, 22 Cal. 667, 83 Am. Dec. 86; *Pierson v. McCahill*, 21 Cal. 120; *Winthrop v. Carlton*, 8 Mass. 456; *Crawford v.*

Form of Pleading not Strictly Regarded.

§ 200. But most of the courts are inclined to see justice done, rather than refine upon matters of prac-

Slade, 9 Ala. 887, 44 Am. Dec. 463; Crawford v. Clute, 7 Ala. 157, 41 Am. Dec. 92; Van Ness v. McLeod, 2 Idaho, 1147, 31 Pac. 798; Wadleigh v. Pillsbury, 14 N. H. 373; McDonald v. Carney, 8 Kan. 20; Trombly v. Clark, 13 Vt. 118; Spicer v. Spicer, 23 Vt. 678; Phipps v. Rieley, 15 Or. 494, 16 Pac. 185.

JUDGMENT WITH STAY OF EXECUTION: In some states the action of the creditor need not be stayed by garnishment proceedings against his debtor in a suit against himself, but no execution can issue on the judgment rendered until the garnishee has been discharged from further liability in the garnishment suit. Spicer v. Spicer, 23 Vt. 678, 680; Hicks v. Gleason, 20 Vt. 139, 142; Morton v. Webb, 7 Vt. 123; Herlow v. Orman, 3 N. M. 291, 6 Pac. 935; Yazoo & M. V. Ry. Co. v. Fulton, 71 Miss. 385, 14 South. 271; St. Louis, I. M. & S. Ry. Co. v. Richter, 48 Ark. 349, 3 S. W. 56; Marden v. Wheelock, 1 Mont. 49.

Whether the defendants had been summoned or were chargeable, in another action, as garnishees of the plaintiff in respect of the money sued for, is immaterial to the question whether the plaintiff is entitled to a verdict in the case at bar. This case must proceed so far as to ascertain what sum, if any, is due from the defendants; and it is not to be delayed on account of the garnishment. Creed v. Creed, 161 Mass. 107, 36 N. E. 749.

In Georgia the same end was accomplished by staying judgment till the garnishment suit is disposed of, and then entering it for the balance not paid in the garnishment suit. Shealy v. Toole, 56 Ga. 210. Compare Connor v. Hanover Ins. Co., 28 Fed. 549.

FAILURE OF GARNISHEE TO GET STAY. If, by his laches or mistake, the garnishee has failed to procure a stay, that fact furnishes no reason for a separate equitable action to compel the parties to interplead. "When the defendant in an action is garnished by a creditor of the plaintiff therein, we apprehend the practice is for the court, on proper application, to stay all proceedings before judgment, or permit judgment to be entered, with stay of execution, as to the whole or a part of the judgment, as circumstances may require." Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310.

SUFFICIENCY OF PLEA: "The answer was insufficient. It did

tice, and, therefore, are not disposed to regard rigidly the manner of presenting the defense, so long as the facts are made to appear.¹⁹

Garnishment in Another Jurisdiction.

§ 201. Does the fact that the garnishment and the suit against the garnishee by his creditor are in different jurisdictions affect the availability of the garnish-

not state the amount of the claims of any of the said parties against the company, or show whether the whole, or what portion, of the debt had been attached, or that any judgment had been rendered against the defendant therein, or that any order had been made upon his answer as garnishee. *Drake, Attachm.* § 705; *Crawford v. Clute*, 7 Ala. 157, 41 Am. Dec. 92. The defect in the answer was not cured by the reply, as that simply stated that the cases mentioned in the answer had been finally disposed of, and the defendant released from all liability. We cannot gather, from either the answer or reply, what portion, if any, of the debt was attached." *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548. Defects in such pleas are cured by failure to urge them in the reply. *Evitt v. Lowery Banking Co.*, 96 Ala. 381, 11 South. 442.

¹⁹ In Rhode Island, it is said that it is only necessary to make it appear to the court that justice requires a stay of proceedings, and the manner of bringing it to the attention of the court need not be strictly regarded. *Smith v. Carroll*, 17 R. I. 125, 21 Atl. 343. See, also, *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905. In *Lynch v. Hartford Ins. Co.*, 17 Fed. 627, a plea in abatement was filed, and the court overruled the plea, but ordered the cause continued till the garnishment suit was disposed of. The same course was pursued in *Winthrop v. Carlton*, 8 Mass. 456, and approved in *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463, where it is also said that, if judgment is rendered, execution should be stayed. In *Jones v. Wood*, 30 Vt. 268, the defendant pleaded the pending garnishment suit in bar, and the court rendered judgment in favor of the plaintiff, but ordered execution stayed. Followed in *Herlow v. Orman*, 3 N. M. 291, 6 Pac. 935; *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Bridges v. Sheldon*, 7 Fed. 17, 41; *Shealy v. Toole*, 56 Ga. 210.

ment as a defense to the suit? We have already seen that demands sued in one jurisdiction cannot, usually, be garnished in another afterwards.²⁰ It is also well established that a plea of *lis alibi pendens*, that there is another suit for the same cause between the parties pending in foreign jurisdiction, is not a good plea.²¹ But by the weight of authority, and for the best of reasons, this rule does not apply to a plea of garnishment pending against the defendant in another jurisdiction, in a suit against the plaintiff. To apply the rule in such cases would either subject the garnishee to double liability, or render all garnishments nugatory by permitting the owner of the garnished debt or property to sue for and recover it after the garnishment, by simply suing in another jurisdiction. For these reasons the pendency of a prior garnishment in a suit against the plaintiff in a foreign jurisdiction is always a good plea.²²

²⁰ See ante, § 144.

²¹ *Stanton v. Embry*, 93 U. S. 548; *Hatch v. Spofford*, 22 Conn. 497, 58 Am. Dec. 433.

²² *Embree v. Hanna*, 5 Johns. (N. Y.) 101; *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905; *Yazoo & M. V. Ry. Co. v. Fulton*, 71 Miss. 385, 14 South. 271; *Baltimore & O. Ry. Co. v. May*, 25 Ohio St. 347; *Mattingly v. Boyd*, 20 How. 128; *Connor v. Hanover Ins. Co.*, 28 Fed. 549.

For a consideration of questions involving conflict of laws, see post, §§ 242-246.

Held, that a judgment against the garnishee, in favor of the defendant, rendered by a court of a foreign jurisdiction in a suit commenced after the garnishment, cannot be pleaded in abatement of the garnishment. *Willard v. Sturm* (Iowa) 65 N. W. 847. But see ante, § 107.

"The general rule is that a plea of *lis alibi pendens* is not good when the litigation is in a court of a foreign jurisdiction. We may regret this, but it has been repeatedly so held. * * * I am fur-

It has been held that a plea of prior garnishment in a foreign jurisdiction is not a good defense to a suit by one claiming as assignee of the defendant before the garnishment was instituted.²³ In such cases the

ther of opinion that, in all ordinary cases, a continuance should be granted *ex comitate*, that the plaintiffs in the foreign actions may have an opportunity to make their attachment available." *Lynch v. Hartford Fire Ins. Co.*, 17 Fed. 627.

GARNISHMENT AFTER SUIT: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant, before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there, in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all governments, if they recognize such proceedings at all, would not fail to regard. If this doctrine is well founded, the priority of suit will determine the right. The rule must be reciprocal, and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court such proceedings cannot arrest the suit; and the maxim '*qui prior est in tempore, potior est in jure*,' must govern the case." *Wallace v. McConnell*, 13 Pet. 136, 150. See, also, *Mack v. Winslow*, 59 Fed. 316, 8 C. C. A. 134; *Wood v. Lake*, 13 Wis. 84.

²³ *North British & Mercantile Ins. Co. v. First Nat. Bank of Tyler*, 3 Tex. Civ. App. 293, 22 S. W. 992.

Such assignee having been duly impleaded or having appeared as
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garnishee should protect himself by filing a bill of interpleader in some state where he can get service on all the parties, or in a federal court.²⁴

claimant in the garnishment suit, such garnishment pending furnishes good ground for a plea in abatement of his subsequent suit upon such demand in another state. *German Bank v. American Fire Ins. Co.*, 83 Iowa, 491, 50 N. W. 53. See, also, post, § 330.

²⁴ See post, § 331.

CHAPTER X.

EFFECT OF GARNISHMENT AS A DEFENSE TO SUBSEQUENT LIABILITY.

- § 202. In General—Complete Defense against Plaintiff and Defendant.
203. — Not a Defense against Third Persons.
204. — Unless Made Parties or Estopped.
205. — When Garnishee has Made Full and Honest Defense.
206. Garnishee's Knowledge that Others than Defendant Claim the Property—At Time of Disclosing or before Judgment.
207. — After Judgment Conditional or Absolute.
208. How Far Judgment against the Garnishee and Unpaid is a Defense.
209. Mode of Satisfying the Garnishment Judgment—Without Execution.
210. — In Something Other than Money.
211. How Far Garnishment Judgment is Res Judicata—Res Judicata against the Plaintiff and the Garnishee.
212. — Not Res Judicata against the Defendant and His Other Creditors.
213. Essentials of a Judgment to be Valid as a Defense—Must Show Jurisdiction and Compliance with Statute.
214. — Presumptions in Favor of Jurisdiction and Regularity.
215. — Erroneous or Default Judgment is Protective, though Reversed after Payment.
216. — Judgment against Part of Sundry Obligors.
217. — Bad Faith in the Garnishee.
218. How the Defense should be Pleaded and Proved—Whether Admissible in Evidence under General Issue.
219. — What is Sufficient Special Plea or Notice.
220. — What must be Proved, and How.

In General.

A Complete Defense against Plaintiff and Defendant.

§ 202. The judgment rendered in the garnishment proceedings is res judicata between the plaintiff and

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the garnishee,¹ and, for the amount which the garnishee has been compelled to pay thereunder, constitutes, if valid, a complete defense to any pending² or subsequent action by the defendant against the garnishee;³ and, in actions by strangers thereto, is as complete a defense as if payment had been made to the

¹ *Bethel v. Linn*, 63 Mich. 464, 471, 30 N. W. 84; *Adams v. Filer*, 7 Wis. 306; *Hewitt v. Foilett*, 51 Wis. 264, 272, 8 N. W. 177.

ACTION FOR FRAUD IN DEFEATING GARNISHMENT: The plaintiff cannot afterwards sue the garnishee, claiming that he obtained his discharge by fraud and perjury, and thereby defrauded the plaintiff of his just lien on the garnished property; for that would, in effect, be trying over the old issue. *Lyford v. Demerritt*, 32 N. H. 234. The plaintiff cannot afterwards sue the defendant for the same alleged fraud as was tried in the garnishment suit. *Bunker v. Tufts*, 57 Me. 417.

After recovering judgment in garnishment against A., as purchaser of certain goods from B., the creditor of B. cannot attach the goods, on the ground that the sale to A. was fraudulent. *Carter v. Smith*, 23 Wis. 497. Compare *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. 145.

² *Foster v. Jones*, 15 Mass. 185; *Cole v. Flitercraft*, 47 Md. 312; *Allen v. Watt*, 79 Ill. 284.

³ *Fasquelle v. Kennedy*, 55 Mich. 306, 21 N. W. 347; *Crone v. Braun*, 23 Minn. 239; *Somers v. Losey*, 48 Mich. 296, 12 N. W. 188; *Bethel v. Judge Superior Court*, 57 Mich. 379, 382, 24 N. W. 112; *Bethel v. Linn*, 63 Mich. 464, 471, 30 N. W. 84; *Adams v. Filer*, 7 Wis. 306; *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599; *Wigwall v. Union Coal & Min. Co.*, 37 Iowa, 129; *Dole v. Boutwell*, 1 Allen (Mass.) 286; *Jarvis v. Mitchell*, 99 Mass. 530; *Coates v. Roberts*, 4 Rawle (Pa.) 100; *Anderson v. Young*, 21 Pa. St. 443; *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643; *Hitt v. Lacy*, 3 Ala. 104, 36 Am. Dec. 440; *Mills v. Stewart*, 12 Ala. 90; *Ross v. Pitts*, 39 Ala. 606; *Cheairs v. Slaten*, 3 Humph. (Tenn.) 101; *Killsa v. Lermond*, 6 Me. 116; *Ladd v. Jacobs*, 64 Me. 347; *Somerville v. Brown*, 5 Gill (Md.) 399; *Sandburg v. Papineau*, 81 Ill. 446; *Telles v. Lynde*, 47 Fed. 912; *City of New Bedford*, 20 Fed. 61; *Insurance Co. of North America v. Friedman*, 74 Tex. 56, 11 S. W. 1046.

If for no other reason, payment having been once compelled by

defendant himself.⁴ "A garnishee who is compelled to pay his debt to his creditor's creditor is not merely subrogated to the latter's right, and forced to resort to set-off for his protection. The payment is itself a release pro tanto."⁵

legal process, the debtor ought not to be required to pay again; and therefore a judgment rendered against one in a foreign country is as valid a defense as if rendered in the forum where he is subsequently sued. *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 20 Johns. 229, and 11 Am. Dec. 269; *Barrow v. West*, 23 Pick. (Mass.) 270.

But, when the judgment was rendered by a court of a sister state, the defense rests on the additional ground that full faith and credit must be given in each state to the judicial proceedings of every other state. U. S. Const. art. 4, § 1. And therefore a garnishment judgment which would be a valid defense in the state where it was rendered is an equally valid defense in every other state. *Chicago, B. & Q. Ry. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475; *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142; *Morgan v. Neville*, 74 Pa. St. 52; *Hull v. Blake*, 13 Mass. 152; *Baltimore & O. Ry. Co. v. May*, 25 Ohio St. 347; *Wheeler v. Winn*, 38 Vt. 122. See, also, *Moore v. Spackman*, 12 Serg. & R. (Pa.) 287; *Moore v. Chicago, R. I. & P. Ry. Co.*, 43 Iowa, 385; *Noble v. Thompson Oil Co.*, 69 Pa. St. 409, 79 Pa. St. 354, and 21 Am. Rep. 66; *Bolton v. Pennsylvania Co.*, 88 Pa. St. 261; *Gunn v. Howell*, 35 Ala. 144; *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870.

JUDGMENT FOR DEBT NO DEFENSE TO SUIT FOR PROPERTY: Held, that a judgment rendered for indebtedness confessed does not discharge the garnishee for property in his possession belonging to the defendant. *Briggs v. McEwen*, 77 Iowa, 303, 42 N. W. 303.

= *Brown v. Dudley*, 33 N. H. 511.

G., being at the same time pursued in different suits by different creditors, one suit being against W. D., and the other against T. D., denied liability to either, and, his answer being contested in each suit, judgment was rendered against him in both, whereupon he paid

⁴ *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Cross v. Brown* (R. I.) 33 Atl. 147, 152.

Not a Defense against Third Persons.

§ 203. But, as every person is entitled to his day in court before his rights are or can be litigated and concluded, such judgment cannot affect the rights of any one not a party or privy to it.⁶

Unless Made Parties or Estopped.

§ 204. But one who has been served with notice of an order of court that he appear in the garnishment suit and defend his rights to the property garnished, and who has failed to do so,⁷ or who, upon receipt of such notice, appears and becomes a party to the ac-

one judgment, and filed a bill to enjoin collection of the other. Held, that the bill was properly dismissed. *Gibson v. Cohen*, 85 Ga. 850, 11 S. E. 141.

⁶ *Littlefield v. Hodge*, 6 Mich. 326; *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80; *Union Bank v. Hanish*, 97 Mich. 404, 56 N. W. 768; *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700; *Adams v. Filler*, 7 Wis. 306; *Emmons v. Dowe*, 2 Wis. 322, 358; *State v. Judge County Court*, 11 Wis. 53; *Olin v. Figeroux*, 1 McM. (S. C.) 203; *Lawrence v. Lane*, 4 Gilman (Ill.) 354; *Cooper v. McClun*, 16 Ill. 435; *Miller v. McLain*, 10 Yerg. (Tenn.) 245; *Gates v. Kerbey*, 13 Mo. 157; *Funkhouser v. How*, 24 Mo. 44; *Dobbins v. Hyde*, 37 Mo. 114; *Wilson v. Murphy*, 45 Mo. 409; *Mankin v. Chandler*, 2 Brock. 125, Fed. Cas. No. 9,030; *Lyman v. Cartwright*, 3 E. D. Smith (N. Y.) 117; *Enos v. Tuttle*, 3 Conn. 27; *Wise v. Hilton*, 4 Me. 435; *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259.

⁷ *Rothschild v. Burton*, 57 Mich. 541, 25 N. W. 49; *Spafford v. Page*, 15 Vt. 490; *Marsh v. Davis*, 24 Vt. 362; *Seward v. Heflin*, 20 Vt. 144; *Smoot v. Eslava*, 23 Ala. 659; *Stevens v. Dillman*, 86 Ill. 233; *Emery v. Davis*, 17 Me. 252; *The St. Louis*, 48 Fed. 312.

But summoning a claimant to answer as garnishee and not as claimant is not sufficient; for, although a garnishee in the same action, he is not a party to the proceedings against the first garnishee, nor bound by the judgment against him. *Emmons v. Dowe*, 2 Wis. 322, 358; *Edwards v. Levisohn*, 80 Ala. 447, 2 South. 161; *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571.

A surety on a bond of restitution executed by the defendant is

tion,⁸ or who, knowing of the garnishment, and being present at the trial, says nothing, but allows judgment to pass against the garnishee, and be paid, before making any claim to the property,⁹ or whom the garnishee has notified to appear and defend his rights in the garnishment suit, or be bound by the judgment rendered therein, and who has disregarded such notice, and failed to appear or defend,¹⁰ will be bound thereby,

not a party to or bound by the judgment against the garnishee. *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259. As to the sufficiency of the notice, see post, § 341.

⁸ *Providence Inst. for Sav. v. Barr*, 17 R. I. 131, 20 Atl. 245; *Fisk v. Weston*, 5 Me. 410.

When the claimant appeared, and was ruled out by the court, and the garnishee did not attempt to show claimant's rights, held, that the judgment would not protect the garnishee. *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Muse v. Lehman*, 30 Kan. 514, 1 Pac. 804.

After judgment against the claimant on the merits of his claim, he is concluded, and the garnishee cannot maintain a bill of interpleader against him and the plaintiff. *Providence Inst. for Sav. v. Barr*, above.

⁹ *Drennon v. Ross*, 2 Colo. App. 181, 29 Pac. 1041.

Compare *Wentworth v. Weymouth*, 11 Me. 446, in which case the claimant gave the garnishee notice before he made his disclosure, but furnished him no evidence of the genuineness of his claim, for want of which the garnishee was charged, and the judgment held conclusive against the claimant. For similar cases, see *Wood v. Partridge*, 11 Mass. 488; *Wigwall v. Union Coal & Min. Co.*, 37 Iowa, 129; *McAllister v. Brooks*, 22 Me. 80, 38 Am. Dec. 282; *Giddings v. Coleman*, 12 N. H. 153.

¹⁰ *Randell v. Way*, 111 Mass. 506; *City of Boston v. Worthington*, 10 Gray (Mass.) 496.

And see the following cases, where the same opinion is expressed, though not involved in the decision: *Born v. Staaden*, 24 Ill. 320; *Pierce v. Chicago & N. W. Ry. Co.*, 36 Wis. 288; *Hanaford v. Hawkins* (R. I.) 28 Atl. 605; *Adams v. Filer*, 7 Wis. 306, 324; *Butler v. Wendell*, 57 Mich. 68, 23 N. W. 460; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 652, 57 N. W. 1050; *Smith v. Ainscow*, 11 Neb. 476, 9 N. W. 646. Compare *Pounds v. Hamner*, 57 Ala. 342.

and estopped thereafter to make any claim against the garnishee for the property involved in the garnishment suit, and which the garnishee has paid or delivered in satisfaction of the judgment rendered against him as such.

When Garnishee has Made Full and Honest Defense.

§ 205. Moreover, if the garnishee has acted fairly and honestly, disclosed all the facts within his knowledge relative to the right to the indebtedness for which he is sought to be charged, reasonably supposed himself indebted to the defendant, and had no actual notice that any one else claimed any interest in the debt garnished, payment of the garnishment judgment rendered against him therefor will discharge the debt, and be an absolute defense to any subsequent action brought against him therefor, even by one who owned the debt at the time the garnishment suit was begun.¹¹ Every defense, arising before notice of assignment, which could be urged by a debtor against his original creditor, may be as effectually urged against the assignee of such creditor; and therefore garnishment judgment against the debtor, before he had notice of an assignment, is a complete bar pro tanto to any future claim against him by such assignee.* The writer

¹¹ *Edwards v. McEnhill*, 51 Mich. 160, 16 N. W. 322; *King v. Vance*, 46 Ind. 246; *Mowry v. Crocker*, 6 Wis. 326; *MacDonald v. Kneeland*, 5 Minn. 352 (Gil. 283); *Hull v. Blake*, 13 Mass. 153; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378; *Warren v. Copelin*, 4 Metc. (Mass.) 594; *Yocum v. White*, 36 Iowa, 288.

**Himrod v. Bough*, 85 Ill. 435; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451; *Dodd v. Brott*, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; *Walters v. Washington Ins. Co.*, 1 Iowa, 405; *McCoid v. Beatty*, 12 Iowa, 299; *Golsan v. Powell*, 32 La. Ann. 1521; *Maloney v. Casey*

is of opinion that the same absolute immunity would be extended the garnishee in all cases where he has been compelled to pay the debt after full and honest defense, disclosing all facts in his knowledge relative to the title to the property.¹²

Garnishee's Knowledge that Others than the Defendant Claim the Property.

At Time of Disclosing or before Judgment.

§ 206. If the garnishee have notice, at the time he makes his disclosure, that any person other than the defendant claims any interest in the property garnished, whether by assignment from the defendant or otherwise,¹³ and especially if his dealings have been

(Mass.) 41 N. E. 104. Compare *Woodbridge v. Perkins*, 3 Day (Conn.) 364; *Clodfelder v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; *Penniman v. Smith*, 5 Lea (Tenn.) 130; *Robertson v. Baker*, 10 Lea (Tenn.) 300; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Ward v. Morrison*, 25 Vt. 593; *Van Buskirk v. Hartford Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473.

It has been held that negotiable paper does not cease to be so by becoming overdue; therefore, that a transfer binds the maker, without notice to him, so as to deprive him of the defense of payment by garnishment in a suit against the payee before notice of the transfer. *Knisely v. Evans*, 34 Ohio St. 158; *Edney v. Willis*, 23 Neb. 56, 36 N. W. 300. Contra, *McCoid v. Beatty*, 12 Iowa, 299; *Mills v. Stewart*, 12 Ala. 90; *Culver v. Parish*, 21 Conn. 408.

¹² *Wentworth v. Weymouth*, 11 Me. 446; *Hull v. Blake*, 13 Mass. 153; *Wilkinson v. Hall*, 6 Gray (Mass.) 568; *Meriam v. Rundlett*, 13 Pick. (Mass.) 511; *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64; *Spafford v. Page*, 15 Vt. 490; *Seward v. Heflin*, 20 Vt. 144; *Work v. Brown*, 38 Neb. 498, 56 N. W. 1082.

¹³ *Kimball v. Macomber*, 50 Mich. 362, 15 N. W. 511; *Tabor v. Van Vranken*, 39 Mich. 793; *Union Bank v. Hanish*, 97 Mich. 404, 56 N. W. 768; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900; *Butler v. Mullen*, 100 Mass. 453; *Wardle v. Briggs*, 131 Mass. 518; *Rutherford*

directly with such other persons,¹⁴ or the property was exempt from garnishment,¹⁵ or if, at any time before judgment is rendered against him, he learns of any claimants of the property, good faith requires that he should bring the facts to the knowledge of the court, that the parties may be cited to appear and defend their claim; and, if he fails to do so, the judgment recovered against him, and paid, will be no protection to him against the subsequent action of such claimant.¹⁶

v. Fullerton, 89 Ga. 353, 15 S. E. 471; *Prescott v. Hull*, 17 Johns. (N. Y.) 284; *Larrabee v. Knight*, 69 Me. 320; *Milliken v. Loring*, 37 Me. 408; *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Phipps v. Rieley*, 15 Or. 494, 16 Pac. 185; *Colvin v. Rich*, 3 Port. (Ala.) 175; *Johns v. Field*, 5 Ala. 484; *Kimbrough v. Davis*, 34 Ala. 590; *Town of Woodlawn v. Purvis* (Ala.) 18 South. 530; *Smith v. Ainscow*, 11 Neb. 476, 9 N. W. 646; *Parker v. Wilson*, 61 Vt. 116, 17 Atl. 747; *Marsh v. Davis*, 24 Vt. 363; *Seward v. Heflin*, 20 Vt. 144; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896; *Large v. Moore*, 17 Iowa, 258; *Stockton v. Hall*, *Hardin* (Ky.) 160; *Bibb v. Tomberlin*, 1 Duv. (Ky.) 183; *Kitzinger v. Beck*, 4 Colo. App. 206, 35 Pac. 278.

¹⁴ *Adams v. Filler*, 7 Wis. 306; *McAuliffe v. Farmer*, 27 Mich. 76; *Hosley v. Scott*, 59 Mich. 420, 26 N. W. 659; *Allen v. Spafford*, 42 Vt. 116.

When the garnishee delivered the property to a claimant of it after the garnishment was served, and took an indemnity bond, and then allowed judgment to pass against him without showing the claimant's rights, and then assigned the indemnity bond to the plaintiff in garnishment, who sued upon it, the court held the bondsmen not liable. *Schempp v. Fry*, 165 Pa. St. 510, 30 Atl. 941.

¹⁵ See ante, §§ 83, 85.

¹⁶ *Foster v. White*, 9 Port. (Ala.) 221; *Crayton v. Clark*, 11 Ala. 787; *Greentree v. Rosenstock*, 34 N. Y. Super. Ct. 505, 61 N. Y. 593; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Lewis v. Dunlap*, 57 Miss. 130; *Cross v. Haldeman*, 15 Ark. 200.

The same rule is applied where the garnishee, in his disclosure, simply suggested the fact of the alleged assignment, and paid the money into court, and suffered judgment to be entered against him without objection. The payment was voluntary, and no protection to

After Judgment Conditional or Absolute.

§ 207. If default has been entered against the garnishee, or conditional judgment, and, before the time for hearing of the summons to show cause why judgment should not be made absolute against him, the garnishee learns of claimants to the property, it would seem proper, for his protection, that he should bring the fact to the knowledge of the court, at such hearing, as reason why judgment should not pass against him till the rights of the claimants are inquired into by making them parties to the proceedings.¹⁷ If absolute judgment has been rendered against the garnishee before he received notice of the claim, by assignment or otherwise, probably the subsequent payment of it would afford him protection against the claimant in all cases where payment before notice would have done so.¹⁸

the action by the assignee, who had no part in the proceedings. *But-ton v. Trader*, 75 Mich. 295, 42 N. W. 834.

So, too, where the garnishee made the disclosure, showing all the facts, and then allowed judgment to be rendered against him by default on issue made, and the property to be taken from him on execution. *Horton v. Grant*, 56 Miss. 404.

"The garnishee is bound to make every just and legal defense which other parties interested in the fund in his hands could make, or he will be answerable to them therefor." *Baldy v. Brady*, 15 Pa. St. 103; *Schempp v. Fry*, 165 Pa. St. 510, 30 Atl. 941.

¹⁷ *McPhail v. Hyatt*, 29 Iowa, 137; *Johns v. Field*, 5 Ala. 484; *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504. Compare *Oldham v. Ledbetter*, 2 Miss. 43, 26 Am. Dec. 690; *Yarborough v. Thompson*, 11 Miss. 291, 41 Am. Dec. 626.

¹⁸ *Hull v. Blake*, 13 Mass. 152; *Covert v. Nelson*, 8 Blackf. 265; *Cooke v. Ross*, 22 Ind. 157; *Newman v. Manning*, 79 Ind. 218; *Walters v. Washington Ins. Co.*, 1 Iowa, 404; *Yocum v. White*, 36 Iowa, 288; *McAllister v. Brooks*, 22 Me. 80, 38 Am. Dec. 282; *Cau-*

How Far Judgment against the Garnishee and Unpaid is a Defense.

§ 208. It has been generally held that the final judgment against the garnishee, as such, although unpaid, constitutes, to the amount of the garnishment judgment, a complete bar to any action by the principal defendant or his assignee against the garnishee.¹⁹ But some of the courts hold that satisfaction of the

aday v. Detrick, 63 Ind. 485; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378.

Held, that the claimant may intervene after judgment against the garnishee. Edwards v. Cosgro, 71 Iowa, 296, 32 N. W. 350; McGuire v. Pitts' Sons, 42 Iowa, 535; Union Pac. Ry. Co. v. Smersh, 22 Neb. 751, 36 N. W. 139. Contra, Heyward v. Phillips-Buttoff Manuf'g Co., 97 Ala. 533, 11 South. 837.

¹⁹ Perkins v. Parker, 1 Mass. 117; Hull v. Blake, 13 Mass. 152; Covert v. Nelson, 8 Blackf. (Ind.) 265; King v. Vance, 46 Ind. 246; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378; Sessions v. Stevens, 1 Fla. 233, 46 Am. Dec. 339; Coburn v. Currens, 1 Bush (Ky.) 242; Matthews v. Houghton, 11 Me. 377; Norris v. Hall, 18 Me. 332; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; Savage's Case, 1 Salk. 291; McDaniel v. Hughes, 3 East, 367; Turnbull's Case, 1 Saund. 67, note 1. Compare Fasquelle v. Kennedy, 55 Mich. 305, 21 N. W. 347.

But the judgment must be final, McPhail v. Hyatt, 29 Iowa, 137; and still in force, Sargeant v. Andrews, 3 Me. 199.

A judgment from which the garnishee has appealed is not pleadable in bar. McCarty v. The City of New Bedford, 4 Fed. 818.

In Georgia, though a garnishment judgment, unpaid, against the maker of a note, is not a defense to an action thereon by an indorsee receiving it since the commencement of the garnishment suit, yet, after action brought by the indorsee, the maker could pay the garnishment judgment, and such payment would discharge him from liability to the indorsee in the subsequent action. Brannon v. Noble, 8 Ga. 549. In Pennsylvania and Maryland, it seems that it must appear, at least, that execution has been levied under the garnishment judgment, or it will not be available as a defense to the subsequent

garnishment judgment is necessary to make it a bar to the subsequent action.²⁰

Mode of Satisfying the Garnishment Judgment.

Without Execution.

§ 209. If the judgment against the garnishee is valid, and has been paid, to the satisfaction of the plaintiff in garnishment, it is difficult to see how the manner of payment can be of any importance.²¹ The

action. *Lowry v. Lumbermen's Bank*, 2 Watts & S. 210; *Brown v. Somerville*, 8 Md. 444. Compare *Cheongwo v. Jones*, 3 Wash. C. C. 359, Fed. Cas. No. 2,638.

²⁰ *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436, *Sharpe v. Wharton*, 85 Ala. 225, 3 South. 787; *Farmer v. Simpson*, 6 Tex. 303; *Wise v. Hilton*, 4 Me. 435; *Yazoo & M. V. Ry. Co. v. Fulton*, 71 Miss. 385, 14 South. 271; *McCarty v. The City of New Bedford*, 4 Fed. 818.

In *Flower v. Parker*, 3 Mason, 247, Fed. Cas. No. 4,891, the plaintiff in garnishment had allowed his judgment to become dormant, and it was held that he had thereby lost his lien, and the garnishee was liable to the plaintiff in the subsequent action.

In *Meriam v. Rundlett*, 13 Pick. (Mass.) 511, that court departed from its former ruling, and, in holding the garnishment judgment unpaid to be no bar to the subsequent action, used the following language: "He who pays under judgment of a tribunal having legal jurisdiction to decide, and adequate power over the person or property to compel obedience to its decisions, has an indisputable claim to protection. But, upon general principles, one who has not yet been compelled to pay, and who may never be obliged to pay, to another, who has attached the debt in his hands, although he may have good right to insist that proceedings ought not to be commenced or prosecuted against him while his hands are tied, and he is legally prohibited from paying his debt, and so may have good ground for an abatement or stay of proceedings, seems in no condition to deny the plaintiff's right to recover his debt, absolutely, and forever."

Payment by note is sufficient payment. *Dole v. Boutwell*, 1 Allen (Mass.) 286.

²¹ BY COMPROMISE: But the supreme court of Maryland has de-

garnishee need not wait till execution has been issued against him on the garnishment judgment, but may voluntarily satisfy the judgment, as soon as it has become binding upon him, and execution might regularly issue, and payment thus made will afford him complete protection,²² although the judgment in the principal suit be afterwards set aside.²³

clared that the defendant is interested in the payment of the whole amount by the garnishee, and that, though a settlement of the judgment by the garnishee, with the garnishment plaintiff, by the garnishee purchasing it for about one-third of its face value, is satisfaction, as between the plaintiff and the garnishee, yet such defense cannot be set up as payment in defense of a suit by the assignee of the defendant. *Brown v. Somerville*, 8 Md. 444.

²² *Griffin v. Potter*, 27 Mich. 166; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188; *Dodd v. Brott*, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; *Mills v. Stewart*, 12 Ala. 90; *Montgomery Gas Light Co. v. Merrick*, 61 Ala. 534; *Barber v. Howd*, 85 Mich. 221, 48 N. W. 539; *Warren v. Copelin*, 4 Metc. (Mass.) 594, 598.

Wetter v. Rucker, 1 Brod. & B. 491, 5 E. C. L. 759, and *Burnap v. Campbell*, 6 Gray (Mass.) 241, are sometimes cited to the contrary; but neither of these cases is authority upon the question, for both are controlled by statutory provisions that payment should be made under execution only.

STATUTE REQUIRING BOND, ETC., BEFORE PAYMENT: The following cases hold that payment of the judgment by the garnishee, voluntarily, before the garnishment plaintiff has complied with the provisions of law entitling him to payment, will not protect the garnishee from subsequent liability: *Myers v. Urich*, 1 Bin. (Pa.) 25; *Oldham v. Ledbetter*, 2 Miss. 43, 26 Am. Dec. 690; *Grissom v. Reynolds*, 2 Miss. 570. And see *McPhail v. Hyatt*, 29 Iowa, 137; *Yocum v. White*, 36 Iowa, 288; *Brown v. Ayers*, 33 Cal. 525, 91 Am. Dec. 655.

When the statute required a bond to be filed in favor of the defendant (in case he is not personally served) before execution could

²³ *Troyer v. Schweiser*, 15 Minn. 241 (Gil. 187). See, also, post, § 215, note 44.

In Something Other than Cash.

§ 210. If the plaintiff in garnishment is willing to accept the promissory note of the garnishee as payment, and does so, that satisfies the judgment, and satisfies the garnishee's obligation to the same extent as if made in money,²⁴ although the note be conditional.²⁵ But a credit entered on the private books of the garnishee in favor of the plaintiff, and a debit for the same amount entered in his account with the defendant, is not payment, where there is no agreement to that effect.²⁶ Payment of the property into court, pursuant to an order of court in the garnishment suit, while the same is pending, discharges the garnishee's obligation to the same extent as if payment were made under execution.²⁷

issue against the garnishee, held, that payment by a garnishee without such bond being filed will protect him. *Stearns v. Wrisley*, 30 Vt. 661.

²⁴ *Dole v. Boutwell*, 1 Allen (Mass.) 286. Compare *Solomons v. Ross*, 1. H. Bl. 131, note.

The fact that garnishee takes a bond of indemnity is immaterial. *Hawley v. Atherton*, 39 Conn. 309; *Palmer v. Woodward*, 28 Conn. 248.

When the garnishee paid the judgment by check to the court, who indorsed it to the garnishing creditor, it was held that it will be presumed, in the absence of evidence to the contrary, that the check was received as payment, and paid, and it is error to submit the question to the jury. *Beatty v. Lehigh Val. Ry. Co.*, 134 Pa. St. 294, 19 Atl. 745.

²⁵ *Cutler v. Baker*, 2 Day (Conn.) 498.

²⁶ *Wetter v. Rucker*, 1 Brod. & B. 491, 5 E. C. L. 759.

²⁷ *Barber v. Howd*, 85 Mich. 221, 48 N. W. 539; *Ohio & M. Ry. Co. v. Alvey*, 43 Ind. 180; *Baltimore & O. Ry. Co. v. May*, 25 Ohio St. 347; *Wilson v. Burney*, 8 Neb. 39. Compare *Rochereau v. Guidry*, 24 La. Ann. 294.

How Far Garnishment Judgment is Res Judicata.*Res Judicata against Plaintiff and Garnishee.*

§ 211. Although the garnishee is discharged from his obligation to the defendant to the extent of the judgment recovered against him, as already stated, yet such judgment is *res judicata* only against the plaintiff and the garnishee.²⁸ Judgment against the garnishee, and payment of it, is *res judicata* against him, so as to preclude him from afterwards recovering it from the defendant, on the ground that he owed nothing, at least when such judgment was by default.²⁹

Not Res Judicata against the Defendant and His Other Creditors.

§ 212. The garnishment judgment is not *res judicata* against the defendant, but only a protection to the garnishee, against payment to the defendant, of what he has paid or is liable to pay to the plaintiff in garnishment. Judgment in the garnishment suit, discharging the garnishee, on the ground that he is not liable to the defendant in any amount, does not prevent the defendant subsequently suing him, and recovering whatever amount he can prove to be due;³⁰ and

²⁸ See ante, § 202.

The judgment against the garnishee for property in his hands precludes him from afterwards claiming against the plaintiff that the property belonged to the garnishee when the judgment was rendered. *Baker's Appeal* (Pa. Sup.) 3 Atl. 766.

²⁹ *Whiteside v. Tunstall*, 17 Ill. 257; *Segog v. Engle*, 43 Minn. 191, 45 N. W. 427; *Ambs v. Towle*, 1 Ind. App. 426, 27 N. E. 625.

³⁰ *Puffer v. Graves*, 26 N. H. 258; *Ruff v. Ruff*, 85 Pa. St. 333; *Pom-*

a judgment for or against a claimant does not determine whether he has a right of action against the garnishee;³¹ and judgment against the garnishee in one amount does not prevent the defendant, in his subsequent action, proving that a larger sum was due, and recovering the same, less the judgment recovered in the garnishment suit.³² Unless the contrary is made to appear, it will be presumed that the judgment in garnishment was equal to the whole amount of his debt.³³ Judgment discharging the garnishee in one garnishment suit does not prevent another creditor of the same defendant charging him as garnishee in respect to the same matter in a subsequent suit.³⁴

eroy v. Rand, McNally & Co. (Ill.) 41 N. E. 636. So, by statute. *Laport v. Bacon*, 48 Vt. 176.

³¹ See post, §§ 350, 351.

When a claimant appears and judgment is rendered in his favor, and he afterwards sues the garnishee for the property or debt, both parties stand in the same position as if no trustee suit had been brought. *Carpenter v. McClure*, 37 Vt. 127; *Hewitt v. Follett*, 51 Wis. 264, 272, 8 N. W. 177.

³² *Groves v. Brown*, 11 Mass. 334; *Collins v. Jennings*, 42 Iowa, 447; *Brown v. Dudley*, 33 N. H. 511; *Barton v. Albright*, 29 Ind. 489; *Cameron v. Stollenwerck*, 6 Ala. 704; *Robeson v. Carpenter*, 7 Mart. (N. S.; La.) 30; *Baxter v. Vincent*, 6 Vt. 614; *Ruff v. Ruff*, 85 Pa. St. 333.

In *Tams v. Bullitt*, 35 Pa. St. 308, held, that garnishment judgment recovered for one amount does not prevent the assignee in insolvency of the defendant proving that a larger amount was due, and recovering the difference.

The disclosure is evidence against the garnishee, as an admission against interest. *Udall v. School District No. 4*, 48 Vt. 588.

³³ *McAllister v. Brooks*, 22 Me. 80, 36 Am. Dec. 436.

³⁴ *Spruill v. Trader*, 5 Jones (N. C.) 39; *Breading v. Seigworth*, 29 Pa. St. 396; *Strauss v. Ayers*, 87 Mo. 348. Contra, *Smith v. Stratton*, 56 Vt. 362.

Essentials of a Judgment to be a Valid Defense.

Must Show Jurisdiction and Compliance with Statute.

§ 213. The garnishment judgment, in order to be a protection to the garnishee against subsequent liability, must have been rendered by a court having jurisdiction of the subject-matter and of the parties;³⁵ and this can be acquired only upon performance of all the statutory prerequisites, and compliance with all the preliminaries which the statute makes conditions of jurisdiction.³⁶ All this must appear of record in

³⁵ *Laidlaw v. Morrow*, 44 Mich. 547, 7 N. W. 191; *Rasmussen v. McCabe*, 46 Wis. 600, 1 N. W. 196; *Wells v. American Express Co.*, 55 Wis. 23, 34, 11 N. W. 541; *O'Rourke v. Chicago, M. & St. P. Ry. Co.*, 55 Iowa, 332, 7 N. W. 582; *Stimpson v. Malden*, 109 Mass. 313; *Harmon v. Birchard*, 8 Blackf. (Ind.) 418; *Alabama G. S. Ry. Co. v. Chumbey*, 92 Ala. 317, 9 South. 286; *Richardson v. Hickman*, 22 Ind. 244; *Terre Haute & I. Ry. Co. v. Baker*, 4 Ind. App. 66, 30 N. E. 431; *Louisville, N. A. & C. Ry. Co. v. Lake*, 5 Ind. App. 450, 31 N. E. 590; *Robertson v. Roberts*, 1 A. K. Marsh (Ky.) 247; *Ford v. Hurd*, 4 Smedes & M. 683; *McPhee v. Gomer* (Colo. App.) 41 Pac. 836.

As to the effect of the garnishee not being subject to such process, see *School District No. 4 of Marathou v. Gage*, 39 Mich. 484; *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643. As to the effect of the property being exempt, see ante, § 83.

In *Loring v. Folger*, 7 Gray, 505, the garnishee was held not protected by payment of a judgment in foreign attachment, in which service on the principal defendant was obtained by publication, because it appeared, afterwards, that the principal defendant died before the publication. But, when the return of the officer to whom the writ in the principal suit was given for service states that the defendant was personally served, payment of the garnishment judgment will protect the garnishee, although the defendant was not actually served, and did not appear. *Morrison v. New Bedford Inst. for Sav.*, 7 Gray (Mass.) 269; *Wheeler v. Aldrich*, 13 Gray, 51.

³⁶ *Wells v. American Express Co.*, 55 Wis. 23, 34, 11 N. W. 541; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57; *State ex rel. Austrian v. Duncan*, 37 Neb. 631, 56 N. W. 214; *Whitcomb v. Atkins*, 40 Neb. 549, 59

the garnishment proceedings which are set up as a defense in the subsequent suit.³⁷

N. W. 86; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161; *Broadhurst v. Morgan* (N. H.) 29 Atl. 553. Compare *Pounds v. Hamner*, 57 Ala. 342.

"The proceeding must have a beginning agreeable to its nature, in order to hold the principal defendant, and the nature of the proceeding requires that the law shall be brought to bear directly against the right of the principal defendant in the hands or under the control of the garnishee; and the mode, and the only one, provided for this, is by service of the process on, or submission to service by, some one competent in law to receive service. The law itself must be caused to attach, and it can be effected in no other way. Independent and spontaneous submission by the custodian or debtor of the right belonging to the principal defendant cannot bind him. The intervention of the law, according to its own substantial appointments, can alone initiate compulsory novation. A garnishee may admit away his own right, over which he has power; but he cannot admit away another's right, over which he has no power. It is a plain proposition that one against whom there is an existing claim cannot, by his own act alone,

³⁷ *Laidlow v. Morrow*, 44 Mich. 547, 7 N. W. 191; *Milwaukee Bridge & Iron Co. v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *Wells v. American Exp. Co.*, 55 Wis. 23, 35, 11 N. W. 541; *Desha v. Baker*, 3 Ark. 509; *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 712.

PRESUMPTIONS OF REGULARITY: Justices of the peace not being required to keep a full record of the proceedings had before them, the regularity of such proceedings will be presumed, if the record shows all the statute requires the justice to record. *Carper v. Richards*, 13 Ohio St. 219.

When the record shows that the justice acquired jurisdiction, it will be liberally construed. *Root v. Davis*, 51 Ohio St. 29, 35 N. E. 669.

When the judgment entry is obscure, it should be construed in the light of the pleadings and whole record. *Fowler v. Doyle*, 16 Iowa, 534.

When the record of the garnishment proceedings offered in evidence failed to show that the plaintiff therein had recovered judgment against the principal defendant therein, held, that they were properly disregarded, because, without this, no judgment could pass against the garnishee. *Barton v. Smith*, 7 Iowa, 85.

Presumptions in Favor of Jurisdiction and Regularity.

§ 214. This appearing, the defense is perfect, however irregular and bungling the judgment entry may be;³⁸ and where a judgment of a court of a sister state is relied upon, and it does not appear what were the requisites of jurisdiction in such other state, the court will presume in favor of the jurisdiction of the

transfer it into an obligation to another. The right itself, and the power to enforce it, must remain in the original owner, unless there is a novation by his consent or by force of legal proceedings; and where the end is sought through the garnishee law, and depends on no assent or acquiescence of the principal defendant, the right must be taken into legal custody, and subjected by course of law; and, as against the principal defendant, this cannot be accomplished by the ex parte action of the debtor or custodian of the right, even on request of the garnishor, though made in the form of complaint filed, and process sent out. There must be action under process which brings home to the garnishee, and the right to be subjected, the power of the law itself." *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

Although the proceedings were properly begun, so that the court acquired jurisdiction, yet, if the plaintiff afterwards allow them to lapse, the garnishee cannot waive the default, appear in answer to summons in continuation of the suit, allow judgment to pass against him thereon, and be protected by such judgment. *Johnson v. Dexter*, 38 Mich. 695. The statute must be strictly followed, to bind the principal defendant. *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050.

When the statute allows the garnishee to pay the money into court on making his disclosure, he may put such a construction upon his disclosure as will show liability, and pay over the money, and strict formality will not be exacted of him. *Barber v. Howd*, 85 Mich. 221, 48 N. W. 539.

When the garnishee, a judgment debtor, paid the plaintiff upon the rendering of a conditional judgment, and afterwards it was made absolute, and the defendant attempted to collect it again, the court held that the trial court properly ordered the first payment credited upon the judgment. *Sandburg v. Papineau*, 81 Ill. 446.

³⁸ *Rasmussen v. McCabe*, 43 Wis. 471; *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599.

court that rendered the judgment;³⁹ and if it appears that the court had jurisdiction, it will be presumed that all the proper steps were taken to charge the garnishee.⁴⁰ If the garnishee contested the jurisdiction of the court, and his objection was overruled, the judgment rendered against him will conclude the question, and cannot be collaterally attacked elsewhere, on the ground that the court had no jurisdiction.⁴¹

³⁹ *Mills v. Stewart*, 12 Ala. 90. And see *Hull v. Blake*, 13 Mass. 153; *Carper v. Richards*, 13 Ohio St. 219.

⁴⁰ *Morgan v. Neville*, 74 Pa. St. 52; *Leonard v. New Bedford Five Cents Sav. Bank*, 116 Mass. 210; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 467, 8 Am. Dec. 581.

⁴¹ *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; *Gunn v. Howell*, 35 Ala. 144; *Connor v. Hanover Ins. Co.*, 28 Fed. 549; *Chicago, B. & Q. Ry. Co. v. Moore*, 31 Neb. 629, 48 N. W. 475.

Beyond all doubt the text states a principle which should be followed at all times, yet it does not appear to have been so followed. *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *McCarty v. Steam-Propeller City of New Bedford*, 4 Fed. 831; *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 56 N. W. 711.

"The question whether or not a certain statutory provision does have the effect of giving the right of garnishment, and whether that statutory regulation has been followed in a particular proceeding, is a matter entirely for the construction of the courts of the jurisdiction. Their decision upon the subject is final, and we cannot go behind it." *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663.

When the defendant appears specially, in the main action, for the purpose of objecting to the jurisdiction of the court, and the court rules against him, and he does not appeal, the garnishee will be protected by a payment into court according to its order. *Axman v. Deuker*, 45 Kan. 179, 745, 25 Pac. 582, and 26 Pac. 946.

Erroneous or Default Judgment is Protective, though Reversed after Payment.

§ 215. If the court had jurisdiction to render it, the judgment of a justice of the peace is as protective as that of the supreme court, and the garnishee is under no obligation to seek to reverse the judgment by appeal;⁴² and, although erroneous, so that it might be reversed by appeal, yet, if this is not done, it is a judgment, and entitled to the same respect as if perfectly regular, and the garnishee will be protected to the same extent by payment under it,⁴³ and reversal of it by the defendant after payment by the garnishee will not render him again liable. His payment is still complete protection.⁴⁴ A judgment by default against the

⁴² Hull v. Blake, 13 Mass. 153; Spafford v. Page, 15 Vt. 494.

⁴³ Bigalow v. Barre, 30 Mich. 1; Rasmussen v. McCabe, 43 Wis. 471; Telles v. Lynde, 47 Fed. 912; Webster v. City of Lowell, 2 Allen (Mass.) 123; Carper v. Richards, 13 Ohio St. 219; Gildersleeve v. Caraway, 19 Ala. 246; Tubb v. Madding, Minor (Ala.) 129; Burton v. District Tp. of Warren, 11 Iowa, 166; Atcheson v. Smith, 3 B. Mon. (Ky.) 502; Rector v. Drury, 4 Chand. (Wis.) 24; Moore v. Chicago, R. I. & P. Ry. Co., 43 Iowa, 385; Axman v. Deuker, 45 Kan. 179, 745, 25 Pac. 582, and 26 Pac. 946; Cornwell v. Hungate, 1 Ind. 156; Lomerson v. Hoffman, 24 N. J. Law, 674; Dole v. Boutwell, 1 Allen (Mass.) 286.

In Stille v. Layton, 2 Har. (Del.) 149, the garnishee is held protected by judgment rendered against him on reference, and not tried according to the appointments of law, there being no evidence of collusion.

But there must be a judgment rendered, or some other proceeding, recognized by the statute as creating a novation; and, if the garnishee volunteers to pay without, he does so at his peril, and the payment will give him no protection. Hitchcock v. Miller, 48 Mich. 603, 12 N. W. 871; Union Bank v. Hanash, 97 Mich. 404, 56 N. W. 768; Emery v. Royal, 117 Ind. 299, 20 N. E. 150.

⁴⁴ Duncan v. Ware, 5 Stew. & P. (Ala.) 119. And see Telles v. Lynde, 47 Fed. 912.

When the judgment in the principal suit is reversed after the gar-

garnishee is as valid a protection as one awarded after vigorous contest.⁴⁵

Judgment against Part of Sundry Obligors.

§ 216. It has been held, in Michigan, that if one of the sundry obligors is summoned as sole garnishee in a suit against the obligee, admits sole liability, and pays the judgment thereupon rendered against him, such payment will be no defense to an action subsequently brought against all the obligors jointly by the obligee;⁴⁶ and the contrary has been held in Alabama.⁴⁷ But if, of several persons liable on an obligation, one is principal, and all the others are sureties, merely, a judgment against the principal, as sole gar-

nishee has paid the judgment against himself, the same rule holds. *Troyer v. Schweizer*, 15 Minn. 241 (Gil. 187); *Richardson v. Hickman*, 22 Ind. 244; *Allen v. Seaver*, 38 Vt. 673.

In such cases the court may, upon the new trial of the main action, in case the defendant is successful, give a judgment in his favor against the plaintiff for the amount collected of the garnishee. *Allen v. Seaver*, 38 Vt. 673.

After a reversal of judgment against the defendant, the garnishee cannot recover of the plaintiff the amount of the garnishment judgment previously paid. The defendant's remedy is against the plaintiff. *Elliot v. Sneed*, 1 Scam. (Ill.) 517.

⁴⁵ *Deno v. Thomas*, 64 Vt. 358, 24 Atl. 140; *Randall v. Way*, 111 Mass. 506; *Gildersleeve v. Caraway*, 19 Ala. 246; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400. And see *Fasquelle v. Kennedy*, 55 Mich. 305, 21 N. W. 347; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236. But, as to exempt property, see ante, §§ 83, 104-107.

⁴⁶ *Wetherwax v. Paine*, 2 Mich. 555; *Hirth v. Pfeifle*, 42 Mich. 31, 3 N. W. 239.

⁴⁷ *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436. Compare, also, *Hutchinson v. Eddy*, 29 Me. 91; *Sangster v. Butt*, 17 Ind. 354.

In *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599, the garnishment suit was nominally against all the obligees jointly, but summons was served on only one, and judgment thereon was held complete defense.

nishee, will discharge the obligation, and protect all parties from further liability.⁴⁸

Bad Faith in Garnishee.

§ 217. The garnishee must act fairly and impartially between the parties. A judgment obtained by the connivance and collusion of the garnishee with the plaintiff in garnishment, and in fraud of the rights of any one, will be no protection to the garnishee against the subsequent suit of such person.⁴⁹ But, if the proceedings are regular, and the garnishee merely aids the plaintiff in getting his claim, this is no fraud upon the defendant,⁵⁰ unless the property is exempt, and the garnishee collusively conceals the proceedings from the defendant, and does not claim the exemption.⁵¹ Of course, fraud will not be presumed.⁵²

How the Defense should be Plead and Proved.

Whether Admissible in Evidence under General Issue.

§ 218. Mr. Chitty, in his valuable work on Pleading, in considering the law, before the Hilary rules,

⁴⁸ Jones v. St. Onge, 67 Wis. 520, 30 N. W. 927; Noble v. Thompson Oil Co., 69 Pa. St. 409; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378.

⁴⁹ Cogswell v. Mitts, 90 Mich. 353, 51 N. W. 514; Smith v. Dickson, 58 Iowa, 444, 10 N. W. 850; Coates v. Roberts, 4 Rawle (Pa.) 100; Black v. Brisbin, 3 Minn. 360 (Gil. 253), 74 Am. Dec. 762; Seward v. Heflin, 20 Vt. 144; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Stille v. Layton, 2 Har. (Del.) 149; Work v. Brown, 38 Neb. 498, 56 N. W. 1082.

⁵⁰ Barber v. Walker, 26 Wis. 44.

⁵¹ Smith v. Dickson, 58 Iowa, 444, 10 N. W. 850; Mace v. Heath, 34 Neb. 790, 52 N. W. 822.

⁵² Andrews v. Herring, 5 Mass. 210.

lays down the rule that, "under the general issue [non assumpsit], any matter which showed that the plaintiff never had cause of action might be given in evidence, and also that, under that plea, most matters, even in discharge of the action, and which showed that, at the time of commencement of the suit, the plaintiff had no subsisting cause of action, might be taken advantage of."⁵³ As a corollary to this proposition, the same learned writer declares that, under this plea, a former recovery by garnishment may be given in evidence, and relied upon as a defense.⁵⁴ But, in Michigan, it is held that the defense cannot be given in evidence under the general issue without notice, but must be pleaded specially, or notice of the defense intended to be relied on given under the statutory general issue.⁵⁵

⁵³ 1 Chit. Pl. 478.

⁵⁴ Id. Citing: *Brook v. Smith*, 1 Salk. 280, 291; *Turbill's Case*, 1 Saund. 67a, note; *McDaniel v. Hughes*, 3 East, 367, 378, 2 Ves. Jr. 106; *Nathan v. Giles*, 5 Taunt. 558, 1 E. C. L. 286; *Morris v. Ludlam*, 2 H. Bl. 362; Com. Dig. "Attachment," A, and "Pleader," 2, G 5. To the same effect, see, also, *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436; *Minard v. Lawler*, 26 Ill. 301.

⁵⁵ *Tabor v. Van Vranken*, 39 Mich. 793; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188; *Walters v. Washington Ins. Co.*, 1 Iowa, 404.

When, after the entry of judgment, the defendant was summoned and charged as garnishee of the plaintiff, and paid the garnishment judgment, and then appealed from the judgment first recovered against him, and in the circuit court sought to rely upon the payment as a defense, without pleading it, the court held that he could do so, saying that the plaintiff knew of the garnishment, and must have known that the defendant would insist upon it as a defense. *Minard v. Lawler*, 26 Ill. 301.

In *White v. Kent* Circuit Judge, 47 Mich. 645, a plea of judgment in garnishment puis darrein continuance was held good, where a former plea, alleging that defendant had been garnished, had been

What is Sufficient Special Plea or Notice.

§ 219. A special plea or notice will be insufficient, and of no avail, unless it identifies the demand sued on as the same demand upon which the defendant has been previously charged as garnishee. It must distinctly allege the fact.⁵⁶ But it is not necessary to aver that the defendant did not have notice of the plaintiff's claims before he was charged as garnishee. If such is the fact, it is matter for the plaintiff to prove.⁵⁷ It is said that, if the defense is not properly pleaded, the party is remediless, both in law and equity, and must pay his debt a second time.⁵⁸

What must be Proved, and How.

§ 220. One seeking protection under a previous garnishment must prove the proceedings and their valid-

withdrawn by leave of the court; and the plea of payment on a judgment in the same proceeding in garnishment having been made in lieu of it, and stricken from the files by order of the circuit judge, the supreme court, by mandamus, compelled it to be restored.

As to how detailed a statement of the garnishment proceedings must be set up in the pleadings, see *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643.

⁵⁶ *Harmon v. Birchard*, 8 Blackf. (Ind.) 418; *Cornwell v. Hungate*, 1 Ind. 156; *Sangster v. Butt*, 17 Ind. 354. Compare *Humphrey v. Barns*, Cro. Eliz. 691.

Judgment and payment under garnishment held sufficiently pleaded. *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643.

⁵⁷ *Mills v. Stewart*, 12 Ala. 90.

An answer by a debtor, in a suit by the assignee of the creditor, setting up payment, as garnishee, in an action against the creditor, and that the debtor did not know of the assignment at the time the garnishment was served, is not sufficient. It must show that he had no notice of the assignment or the assignee's claim at the time of making answer. *Town of Woodlawn v. Purvis* (Ala.) 18 South. 530.

⁵⁸ *Drake*, Attachm. § 722, citing *Turbill's Case*, 1 Saund. 67, note 1; *Coates v. Roberts*, 4 Rawle (Pa.) 100.

ity,⁵⁹ except so far as the same will be presumed,⁶⁰ and must identify the demand sued on as the same one upon which he has been previously charged as garnishee.⁶¹ Of course, the proper evidence to prove the judgment is the record itself,⁶² or a duly-certified transcript of the record⁶³ and of all other papers necessary

⁵⁹ *Wells v. American Express Co.*, 55 Wis. 23, 34, 11 N. W. 537; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57; *Barton v. Smith*, 7 Iowa, 84.

Holding that the court will presume omnia rite acta in favor of a foreign judgment, see *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 467, 8 Am. Dec. 581.

⁶⁰ As to how far presumed, see ante, § 214.

⁶¹ *Wetherwax v. Paine*, 2 Mich. 555, 560; *Dirlam v. Wenger*, 14 Mo. 548; *Harmon v. Birchard*, 8 Blackf. (Ind.) 418; *Cornwell v. Hungate*, 1 Ind. 156; *Sangster v. Butt*, 17 Ind. 354.

Considering this fact, the reader will note the vital importance of answering the garnishment summons rather than letting judgment go by default for want of answer, and the prudence of stating in the answer every fact tending to show the nature of the garnishee's liability, and identifying it, in view of future litigation. One of two joint makers of a note was summoned as garnishee of the payee, and suffered judgment to go against him by default. Afterwards both makers were sued jointly on the note by the payee, and set up the payment of the garnishment as a defense; but, failing to show, on the trial, that he was charged as garnishee in respect to the note sued on, it was held that the fact could not be presumed, and they were still liable to the payee for the full amount of the note. *Hutchinson v. Eddy*, 29 Me. 91. *Sangster v. Butt*, 17 Ind. 354, was a very similar case, and was decided the same way, only the question arose on demurrer.

But parol evidence is admissible to prove the identity of the demands. *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378. If this were not so, a judgment by default would never afford the garnishee any protection.

⁶² *Rasmussen v. McCabe*. 43 Wis. 471.

⁶³ *Rector v. Drury*, 4 Chand. (Wis.) 24.

to show that the court had jurisdiction;⁶⁴ for this must be proved. But, if jurisdiction, *prima facie*, appears from the record itself, nothing further need be produced.⁶⁵ If the records have been lost or destroyed, that fact should be shown, and the jurisdiction proved by parol.⁶⁶ It has been held, in Massachusetts, that a *prima facie* case is made by the execution on which the judgment was paid, and which contained recitals of the necessary facts.⁶⁷

⁶⁴ Wells v. American Express Co., 55 Wis. 23, 35, 11 N. W. 541.

⁶⁵ Rector v. Drury, 4 Chand. (Wis.) 24.

⁶⁶ Wells v. American Express Co., 55 Wis. 23, 35, 12 N. W. 441.

⁶⁷ Leonard v. New Bedford Five Cents Sav. Bank, 116 Mass. 210.

CHAPTER XI.

JURISDICTION.

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- 244. — Other Rules to Determine Situs of Debts.
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In General.

Definition and Essentials.

§ 221. Jurisdiction is the authority to hear and determine the cause, and refers to the power of the court over the parties, the res or property in contest, and the authority of the court to entertain the suit or proceeding and render the judgment or decree which it assumes to make. In garnishment proceedings, all the statutory prerequisites to commencement of suit are jurisdictional, and must be strictly complied with. Every direction of the statute before jurisdiction acquired must be followed, every requirement performed, and for every step taken, up to this time, at least, authority must be found in the statute under which the proceedings are conducted, or the whole matter will be *coram non judice*, and void.¹ The proceeding is ancillary to the principal suit, and purely statutory and special, and there is no authority for any action, or prohibition of action, except what is found in the statute.

Outline.

§ 222. With these principles in mind, the reader will note that the answer to the question, has the court jurisdiction? naturally divides itself into a consideration of: (1) The inherent power of the court to entertain proceedings of this nature, or the particular suit; (2) the proper institution of the suit against the principal defendant, and the conduct thereof; (3) the commencement of the garnishment suit, and obtaining jurisdiction of the garnishee; (4) jurisdiction over the

¹ See ante, §§ 6, 213.

property sought to be reached by the garnishment. To the consideration of these, in their order, let us now turn our attention.

Inherent Authority of the Court.

§ 223. Garnishment is an innovation on the common law,² and therefore no common-law court could entertain such proceedings upon its common-law authority. It logically follows that, although the statute may perfectly provide for this remedy, and the manner of conducting it, yet no court not especially empowered by the statute to do so can entertain proceedings under it.³

Jurisdiction of the Principal Suit.

Essential to Support Garnishment Proceedings.

§ 224. Garnishment proceedings, being purely ancillary to the suit against the principal defendant, de-

² Ante, § 6.

³ Lewis v. Sercomb, 1 Wis. 394. See, also, Dew v. Bank of Alabama, 9 Ala. 323. Compare ante, § 10.

In Harmon v. Birchard, 8 Blackf. (Ind.) 418, the justice of the peace assuming to act was by law prohibited from trying cases of the nature of the action against the principal defendant.

Garnishment is a statutory proceeding, and can be issued only in the cases and by the officers authorized by statute. Donald v. Nelson, 95 Ala. 111, 10 South. 317. A similar question is discussed in Mayor, etc., of Jersey City v. Horton, 38 N. J. Law, 88.

It is quite true that the United States courts do not entertain jurisdiction of garnishment proceedings by virtue of any clause in the state statutes under which they proceed, but—what is equivalent to it—are empowered by U. S. Rev. St. §§ 915, 916, to proceed under such state laws, thus, in effect, making them, for the purpose, United States statutes. Canal & Claiborne St. Ry. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127.

pend upon it for their existence and validity. If, for any reason, the court fails to get jurisdiction of the principal suit, the garnishment must inevitably fall with it. This principle is universal. It is all the same whether the lapsing came from failure to get personal service of the summons in the principal suit, upon the defendant therein, in the time and manner prescribed by law,⁴ or from failure to comply with the statute directing the mode of obtaining substituted service thereof, by publication or otherwise.⁵ The issuing of the original writ, or, if the statute requires

⁴ *Axtell v. Gibbs*, 52 Mich. 640, 18 N. W. 396; *Lackett v. Rumbaugh*, 45 Fed. 23. 30.

Where the first summons against the principal defendant, and upon which the garnishment summons was issued, is returned "Not served," because the officer was unable to find the principal defendant, and the plaintiff seeks to preserve his lien on the property or funds in the hands of the garnishee by issuing alias and pluries summons in continuance of his suit, the court in which the proceedings are conducted may discharge the garnishee, with costs, if it appears that unreasonable delay is made in bringing in the defendant. *Noble v. Bourke*, 44 Mich. 193, 6 N. W. 237.

When a writ is returned unexecuted, and it is sought to keep the proceedings alive by issuing alias and pluries writs, the record must show the facts of issue and return. *Lackett v. Rumbaugh*, 45 Fed. 23, 50.

⁵ *Laidlaw v. Morrow*, 44 Mich. 547, 7 N. W. 191; *Kraft v. Rath*, 45 Mich. 20, 7 N. W. 232; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 397, 18 N. W. 121; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613; *Streissguth v. Reigelman*, 75 Wis. 212, 43 N. W. 1116; *Frisk v. Reigelman*, 75 Wis. 499, 505, 43 N. W. 1117; *Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596; *Washburn v. New York & Vermont Mining Co.*, 41 Vt. 50; *Railroad Co. v. Todd*, 11 Heisk. (Tenn.) 549; *Paul v. Bird*, 25 N. J. Law, 559.

That the statute has been complied with must appear from the return of the officer serving the summons. *Laidlaw v. Morrow*, above. Compare, also, *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *Healey v. Butler*, 66 Wis. 9, 27 N. W. 822. But, held, in Wisconsin, that the fact may be

no original writ, then, the filing of the declaration, constitutes the commencement of an action, in such a sense as to authorize garnishment; and it is not necessary that the papers shall have been placed in the hands of an officer for service before the garnishment is instituted.⁶

Garnishee may Question.

§ 225. The garnishee may raise and rely upon the objection at any stage of the proceedings. He does not waive it by answering and going to trial.⁷ If judg-

proved, and the return or proof filed, even in the appellate court. *Frisk v. Reigelman*, above.

"The plaintiff must have a judgment against the principal defendant, or have commenced a suit against such principal defendant, upon contract, expressed or implied, or upon judgment, before he can have process against the garnishee. How. Ann. St. § 8031. And before judgment can be rendered against the garnishee he must have obtained judgment against the principal defendant. Id. § 8037. And after judgment has been obtained against the principal defendant, the garnishee is still entitled to his day in court, to show cause, if he can, why judgment should not be rendered against him; and if he does not voluntarily appear and permit judgment to be taken against him, he must be brought in by summons from the justice." *Iron Cliffs Co. v. Lahais*, supra.

"There are two things necessary to give a court jurisdiction of proceedings in garnishment, under our statute: One, that the principal action is 'founded upon contract, express or implied, or upon a judgment or decree'; the other, that an affidavit has been made and filed, setting forth the indebtedness, etc., of the party to be garnished. No summons can be properly issued without these prerequisites." *Black v. Brisbin*, 3 Minn. 360 (Gil. 253, 256), 74 Am. Dec. 762.

Though jurisdiction of the suit against the principal defendant may be acquired by attachment of his property, under the statutes so providing, yet, where the only property attached is the debt of the garnishee, it must be made to appear that there is a debt attached, before judgment can be rendered. *Byers v. Baker* (Ala.) 16 South. 72.

⁶ *McDonald v. Alanson Manuf'g Co.* (Mich.) 64 N. W. 730.

⁷ *Thayer v. Tyler*, 10 Gray, 164; *Pratt v. Cunliff*, 9 Allen, 90; *Wood-*
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ment has been rendered against the defendant, but is absolutely void, of course, it cannot support the garnishment proceedings, and the garnishee should move the court that he be discharged on that ground.⁸ So, too, if the execution on which the garnishment depended was void.⁹

Cannot Object to Errors not Affecting Jurisdiction.

§ 226. On the other hand, if the court has jurisdiction of the principal suit, the garnishee can inquire no further; for no errors or irregularities therein, not jurisdictional, will in any manner impair the protective force of the garnishment judgment, and beyond this the garnishee has no interest.¹⁰ Even though the

folk v. Whitworth, 5 Cold. (Tenn.) 561; Erwin v. Heath, 50 Miss. 795; Melloy v. Burtis, 124 Pa. St. 161, 16 Atl. 747; Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Dennison v. Taylor, 142 Ill. 45, 31 N. E. 148; Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982; McGuire v. Pitts' Sons, 42 Iowa, 535; Merchants & Manufacturers' Nat. Bank v. Haiman, 80 Ga. 624, 5 S. E. 795; Everett v. Connecticut Mut. Life Ins. Co., 4 Colo. App. 509, 36 Pac. 616.

The defect is not cured by a judgment by default entered against the garnishee. Debs v. Dalton, 7 Ind. App. 84, 34 N. E. 236.

MOTION TO STRIKE: "It has been held that, under the general plea of nulla bona, the garnishee may, on trial of the issue, take advantage of the invalidity of the judgment on which the scire facias issued. Pancake v. Harris, 10 Serg. & R. 109; Thornton v. Bonham, 2 Pa. St. 102. If he can do that, there is no good reason why he may not apply to the court, in behalf of the nonresident defendant, and have an improvidently granted judgment stricken off, as was done in this case." Melloy v. Burtis, above.

⁸ Beaupre v. Brigham, 79 Wis. 436, 48 N. W. 596; Smith v. McCutchen, 38 Mo. 415; Smith v. Montoya, 3 N. M. 39, 1 Pac. 175; Webb v. Lea, 6 Yerg. (Tenn.) 473; Louisville, N. A. & C. Ry. Co. v. Lake, 5 Ind. App. 450, 32 N. E. 590; Dew v. Bank of Alabama, 9 Ala. 323; McPhee v. Gomer (Colo. App.) 41 Pac. 836; Featherston v. Compton, 8 La. Ann. 285.

⁹ Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369.

¹⁰ Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Mead v. Doe, 18

principal defendant take advantage of such errors, and have the judgment reversed or set aside after the garnishee has paid the judgment against him, the payment still protects the garnishee.¹¹ But, if the judgment in the principal suit is reversed before payment, the garnishment falls.¹²

Wis. 31; *White v. Simpson* (Ala.) 18 South. 151; *Houston v. Walcott*, 1 Iowa, 86; *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587; *Storm v. Adams*, 56 Wis. 138, 14 N. W. 69; *Exchange Bank of Macon v. Freeman*, 89 Ga. 71, 15 S. E. 693; *Ohio & M. Ry. Co. v. Alvey*, 43 Ind. 180; *Illinois Cent. Ry. Co. v. Brooks*, 90 Tenn. 161, 16 S. W. 77; *Atcheson v. Smith*, 3 B. Mon. (Ky.) 502; *Empire Car Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417; *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148; *Lomerson v. Hoffman*, 24 N. J. Law, 674; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 417, 421; *White v. Casey*, 25 Tex. 552; *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469.

So held, as to execution on which garnishment issued, being irregular. *Drake v. Harrison*, 69 Wis. 99, 113, 33 N. W. 81.

LOSS OF JURISDICTION ONCE ACQUIRED: The language of the supreme court of Michigan would seem to indicate that they consider the following of the statutory regulations respecting the conduct of cases commenced by publication or substituted service to be all jurisdictional, whether they relate to the acquiring of jurisdiction or subsequent conduct of the cause, and that, though the court may have acquired jurisdiction by proper proceedings, it would lose it by subsequent unauthorized acts, and that these acts would not be mere error. *Segar v. Muskegon Shingle & Lumber Co.*, 81 Mich. 344, 347, 45 N. W. 982. Compare *Heritage v. Armstrong*, 101 Mich. 85, 59 N. W. 439. But see *Rector v. Drury*, 4 Chand. (Wis.) 24.

UNAUTHORIZED DEFENSE FOR GARNISHEE: When the statute permits the garnishee to appear in and defend the principal action, the same as the defendant might, it is optional with him whether he will so appear; and he may have an appearance and plea stricken out which are entered without his authority, for the defendant may appear and plead in his own behalf, regardless of any defense made by the garnishee. *Albert v. Albert*, 78 Md. 338, 28 Atl. 388.

¹¹ *Troyer v. Schweizer*, 15 Minn. 241 (Gil., 187); *Montgomery Gas Light Co. v. Merrick*, 61 Ala. 534. See, also, ante, § 215, note 44.

¹² *Clough v. Buck*, 6 Neb. 343; *Railroad Co. v. Todd*, 11 Heisk.

Conclusive Presumption of Absolute Verity of the Record.

§ 227. The majority of the decisions of the courts of the various states support the proposition that a judgment cannot be attacked collaterally, on the ground that the facts necessary to confer jurisdiction did not exist, where the record of the judgment recites or declares the existence of these facts; in other words, that the record cannot be contradicted. This rule has only been applied to domestic judgments. When a judgment of a court of another state is relied upon, either as cause of action or ground of defense, it has always been allowed the other party to show that the court rendering it had no jurisdiction. But the reasons advanced in support of this conclusive presumption of absolute verity in the record of a domestic judgment (public policy and sanctity of the records) apply equally to the judgments of courts of other states.

Recitals of Record not Conclusive.

§ 228. There is a very respectable array of authorities holding that there is no distinction, and that the record may be proved false in all cases.¹³ These cases declare that to say the defendant should raise the point in the direct proceeding is mockery; for, in most cases, where judgments are collaterally attacked for want of jurisdiction, the defendant not being duly served, he did not know of the judgment till it was too late to appeal or otherwise defend therein; and to say that the judgment is a record because the court had jurisdiction, and the court had jurisdiction because the record says so, is to reason in a vicious circle.

(Tenn.) 549; Rowlett v. Lane, 43 Tex. 274. See, also, Montgomery Gas Light Co. v. Merrick, 61 Ala. 534.

¹³ See Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589, and Black, Judgm. §§ 273-276, where the cases are reviewed.

Whether Record is Conclusive against Garnishee.

§ 229. The writer has found but few reported cases deciding the question whether the statements contained in the record of the main action are conclusive upon the garnishee. These all seem to have been rendered by courts adopting the doctrine that the record is conclusive. They hold that the garnishee cannot dispute the record of the main action.¹⁴ Whatever may be the law between the parties, or even between one of the parties and a stranger to the suit, the writer is of very firm conviction that this indisputable presumption should never be applied against a garnishee, who, from his position, can never raise the question directly, and whose property may be taken from him upon that judgment, or proceedings ancillary to it, without any assurance of protection from future liability in another state. It is generally admitted that the record of any judgment may be contradicted, to show want of jurisdiction, where such judgment was rendered by a court of another state, and this has often been done in garnishment proceedings.¹⁵ Adding to this the well-settled principle that payment of a garnishment judgment rendered by a court having no jurisdiction affords the garnishee no protection,¹⁶ what assurance has the garnishee that he will not again be required to pay in a suit in another state?

¹⁴ *Castner v. Styer*, 23 N. J. Law, 236; *Coit v. Haven*, 30 Conn. 190; *Stadler v. Prairie Lodge*, 59 Miss. 572.

¹⁵ *O'Rourke v. Chicago, M. & St. P. Ry. Co.*, 55 Iowa, 332, 7 N. W. 582; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Loring v. Folger*, 7 Gray (Mass.) 505.

¹⁶ See ante, § 213.

Effect of General Appearance by Defendant.

Before Garnishment is Instituted.

§ 230. It has been said that, if the principal defendant appear generally in the principal suit, it is of no further concern to the garnishee whether the court had previously acquired jurisdiction or not; for, the defendant having waived the point, the garnishee is protected, and cannot afterwards urge it.¹⁷ When the appearance of the defendant was entered before the garnishment suit was begun, such a result would be inevitable, and there can be no question as to the correctness of the proposition as applied to such cases; for, then, there is a valid and subsisting case in court when the garnishment is instituted.

After Garnishment is Instituted.

§ 231. But, if the appearance was not till after the garnishment was begun, it is difficult to see upon what principle such appearance can relate back in such a manner as to afford it any support. It is fundamental that the garnishment is merely ancillary to the principal suit.¹⁸ Garnishment must have a valid inception; and, though the mere issuing of summons, and placing the same in the hands of an officer for service, is commencement of suit, and authorizes the issuing of garnishment, yet, if such original summons, or an alias in the place of it, is never served on the principal defendant in such a manner as to give the court jurisdiction of the principal suit, the gar-

¹⁷ *Baltimore & O. Ry. Co. v. Taylor*, 81 Ind. 24; *Ohio & M. Ry. Co. v. Alvey*, 43 Ind. 180; *Washburn v. New York & V. M. Co.*, 41 Vt. 50; *Featherston v. Compton*, 3 La. Ann. 380.

¹⁸ See ante, § 2.

nishment must fall for lack of support, and no subsequent appearance and submission to the jurisdiction of the court by the principal defendant can save it. This has been directly held in several cases.¹⁹

Appearance in Garnishment Suit.

§ 232. The appearance of the principal defendant in the garnishment proceeding will not confer jurisdiction over the main action when the court did not before have it;²⁰ nor will it confer jurisdiction of the garnishment proceedings.²¹ Of course, a general appearance in the main action by the principal defendant cures no defects in the ancillary garnishment proceedings.²²

¹⁹ *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 397, 18 N. W. 121; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 126, 23 N. W. 613; *McGuire v. Church*, 49 Conn. 248; *Lackett v. Rumoagh*, 45 Fed. 23, 30. Compare *Steen v. Norton*, 45 Wis. 412, 417 (dictum); *Healey v. Butler*, 66 Wis. 9, 14, 27 N. W. 822.

APPEARANCE BY DEFENDANT WILL SUPPORT PREVIOUS GARNISHMENT: Held, that a general appearance by the defendant in attachment estops him from questioning the validity of the proceedings to support a previous garnishment. *Parks v. Adams*, 113 N. C. 473, 18 S. E. 665. Compare *Reed v. Fletcher*, 24 Neb. 435, 37 N. W. 437, 444.

When the justice of the peace, after the garnishee was served, had lost jurisdiction of the defendant in the main action by an unauthorized adjournment, held that, after the defendant had again appeared and waived the error, the breach did not defeat the garnishment, and would not sustain a motion to dismiss. *Bryant v. Pember*, 43 Vt. 599.

²⁰ *Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596; *State v. Cordes*, 87 Wis. 374, 58 N. W. 771. Compare *Healey v. Butler*, 66 Wis. 9, 14, 27 N. W. 822.

²¹ *Insurance Co. of North America v. Friedman*, 74 Tex. 56, 11 S. W. 1046.

²² *Greene v. Tripp*, 11 R. I. 424.

Jurisdiction Acquired by Substituted Service.

§ 233. The principal defendant must have an opportunity to defend his rights, and notice of the proceedings against him, either actual or constructive; but, as every person is presumed to have constant possession of his property, notice to his debtor, or one having actual possession of his property, to appear and answer as garnishee of his creditor, or the owner of the property in his possession, together with service of notice upon him for the defendant, may be declared, by law, to be notice to the defendant.²³ These are the only constitutional requisites to the validity of legis-

²³ *Newland v. Circuit Judge of Wayne Co.*, 85 Mich. 151, 48 N. W. 544; *Moore v. Wayne Circuit Judge*, 55 Mich. 87, 20 N. W. 801; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978; *Foy v. East Dallas Bank* (Tex. Civ. App.) 28 S. W. 137. Compare *Gowan v. Hanson*, 55 Wis. 341, 13 N. W. 238.

In delivering the majority opinion of the court in *Moore v. Wayne Circuit Judge*, above, *Champlin, J.*, uses this language: "It is a well-recognized principle that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory, and it may make laws to subject property situated within its limits, owned by nonresidents, to the payment of claims due to its own citizens from them. Such legislation is based upon the necessity of the case, and the injustice which would result from permitting nonresident debtors to withdraw their property or assets from the jurisdiction of the state, and is a legitimate exercise of its authority to hold and appropriate the property of such debtors to satisfy the claims of its own citizens. 1 *Smith, Lead. Cas.* (7th Ed.) 1121 et seq. In the absence of personal service upon the nonresident defendant within the jurisdiction of the court, or his voluntary appearance in the suit, the jurisdiction can extend no further than an inquiry as to the amount of the obligation of the nonresident to its own citizens, for the purpose of showing the extent necessary to control the disposition of the property,"—citing *Picquet v. Swan*, 5

lation prescribing the mode of substituted service, and result, necessarily, from the universally acknowledged principles that no man's property can be taken from him without due process of law, nor his rights adjudicated till he has had his day in court.²⁴

Jurisdiction of the Garnishment Suit.

§ 234. The consideration of this topic involves an examination of the whole subject of procedure from affidavit to judgment, and therefore the reader is referred, for treatment of each particular question on which it depends, to the subsequent pages, where each topic is taken up *seriatim*.

Mason, 35, Fed. Cas. No. 11,134; Boswell's Lessee v. Otis, 9 How. 336; Cooper v. Reynolds, 10 Wall. 308; Pennoyer v. Neff, 95 U. S. 714; Freem. Judgm. § 573; Whart. Conf. Laws, §§ 649, 715; Am. Lead. Cas. (5th Ed.) 625 et seq. See, also, Freeman v. Anderson, 119 U. S. 185, 7 Sup. Ct. 165; Curtis v. Bradford, 33 Wis. 190; Beaupre v. Brigham, 79 Wis. 436, 48 N. W. 596.

But there is no valid reason why courts may not acquire jurisdiction by this proceeding over persons and choses in action, as well where both parties to the original action are nonresidents of the state as where the plaintiff in the original suit is a resident, and it was so held in *Newland v. Circuit Judge of Wayne Co.*, *supra*.

If the defendant is not personally served and does not appear, no property being attached, and the garnishee summoned not being indebted or otherwise liable, jurisdiction fails. *Searing v. Benton*, 41 Kan. 758, 21 Pac. 800; *Martin v. Dryden*, 6 Ill. 187; *Byers v. Baker* (Ala.) 16 South. 72; *Morris v. Union Pac. Ry. Co.*, 56 Iowa, 135, 8 N. W. 804.

²⁴ *Dorr's Adm'r v. Rohr*, 82 Va. 359.

Pennoyer v. Neff, 95 U. S. 714, is the principal case on this subject, and the opinions in it are very elaborate and carefully written. See, also, the cases following, bearing directly on the subject, and citing this case: *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Town of Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557.

Dependent upon Amount Involved.

§ 235. So far as the jurisdiction depends upon the amount involved, the question is tried by the amount of the plaintiff's claim, and not upon the amount of the garnishee's indebtedness, or the value of the property in his possession.²⁵ If the court has jurisdiction of the main action, it will entertain the garnishment, regardless of the amount of the garnishee's liability; for the garnishment is a levy made in that suit, and jurisdiction does not depend upon the value of the property levied upon.²⁶ But, when the garnishment proceedings alone are appealed, and jurisdiction to entertain the appeal depends upon the amount involved, the jurisdiction depends upon the amount claimed in the garnishment suit; and this cannot be made by adding together the sums claimed in several garnishments, which are appealed together.²⁷

²⁵ *Wetherwax v. Paine*, 2 Mich. 555; *Wood v. Rocchi*, 32 La. Ann. 1120; *State Nat. Bank v. Allen*, 39 La. Ann. 806, 2 South. 600; *Pomeroy v. Rand, McNally & Co.* (Ill. Sup.) 41 N. E. 636. Contra, *Traylor v. Allen* (Ark.) 31 S. W. 570 (*Haines v. O'Connor*, 5 Ill. App. 213, and *Pomeroy v. Rand, McNally & Co.*, 54 Ill. App. 522, overruled).

The statute limiting the jurisdiction of the justices of the peace to suits in which the demand does not exceed \$40 must mean the demand against the principal defendant, and therefore a judgment against the garnishee for a greater sum is not in excess of the jurisdiction of the justice. *Briggs v. Beach*, 18 Vt. 115. Compare *Harmon v. Harwood*, 35 Vt. 211. Jurisdiction to try the issue between the plaintiff and the claimant does not depend upon the amount of the claimant's demand against the garnishee. *Edwards v. Cosgro*, 71 Iowa, 296, 32 N. W. 350.

²⁶ *Moore v. Kelley*, 47 Ark. 219, 1 S. W. 97.

²⁷ *State Nat. Bank v. Allen*, 39 La. Ann. 806, 2 South. 600.

When there were several garnishments in the same court against the same fund by different creditors, and the garnishee paid the money into court, and was discharged, it was held that, the whole

Dependent on Jurisdiction over the Main Action.

§ 236. Garnishment can only issue from, be returned to, and be tried by the court having jurisdiction of the action or judgment against the principal defendant.²⁸

Dependent on the Garnishee's Residence.

§ 237. Garnishment proceedings are held not to be limited by the statutes declaring that suits must be

fund being sufficient to support the jurisdiction of the appellate court, and the intervener claiming the whole of it, the court had jurisdiction to try his appeals from the judgments against him, although the amount awarded to each of the garnishing creditors was less than \$100. *Edwards v. Cosgro*, 71 Iowa, 296, 32 N. W. 350. Compare *Church v. French*, 54 Vt. 420.

A claimant cannot appeal from a judgment against him which, being less than \$20, was not large enough to entitle any of the other parties to an appeal. *Cabot v. Burnham*, 28 Vt. 694.

²⁸ *Hughes v. Ft. Dearborn Nat. Bank*, 47 Ill. App. 567; *Toledo, W. & W. Ry. Co. v. Reynolds*, 72 Ill. 487; *McGuire v. Pitts' Sons*, 42 Iowa, 535; *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850; *New York, L. E. & W. Ry. Co. v. Cookson*, 45 N. J. Law, 302; *First Nat. Bank v. Dunn*, 102 Ala. 204, 14 South. 559; *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160.

Some of the statutes authorize the writ to be issued by some other court or officer, and made returnable to the court having jurisdiction of the main action. *Pratt v. Young*, 90 Ga. 39, 15 S. E. 630; *Thompson v. Carper*, 11 Humph. (Tenn.) 542; *West v. Harvey*, 81 Ga. 711, 8 S. E. 449.

The garnishment may be separated from the main action by appeal or change of venue. See post, §§ 327, 405.

Under a statute providing that transcripts of judgments may be filed in the office of the clerk of the courts of counties other than the one in which the judgment is rendered, and, upon filing such transcript, the judgment shall be a lien on all the land of the judgment debtor within the county, the clerk has no authority to issue execution or garnishment, and all proceedings in either are void. *Seaton v. Hamilton*, 10 Iowa, 394. Compare *Weimeister v. Singer*, 44 Mich. 406, 6 N. W. 858.

brought in the county where one of the party resides. Such suits may be commenced at any place where service can be had upon the garnishee under a writ issuing from the court having jurisdiction of the main action.²⁹ At all events, immunity from suit in courts away from his place of residence is a personal privilege, which the garnishee may waive,³⁰ although he cannot waive the defendant's rights, or thus confer jurisdiction of the subject-matter.³¹ It has also been held that, in order to render a garnishment available, the main action may be brought in a county other than that of the defendant's residence, although the statute require that actions shall be brought in the county in which the defendant, or one of the defendants, resides.³²

²⁹ *Toledo, W. & W. Ry. Co. v. Reynolus*, 72 Ill. 487; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Sherwood v. Stevenson*, 25 Conn. 431. Contra, *South Omaha Nat. Bank v. Farmers' & Merchants' Nat. Bank (Neb.)* 63 N. W. 128; *West v. Harvey*, 81 Ga. 711, 8 S. E. 449.

When both plaintiff and defendant are nonresidents, it is held that the action must be brought in the county in which the garnishee resides. *Stern v. Frazer* Circuit Judge (Mich.) 63 N. W. 968. For further decisions concerning residence of garnishee, see ante, §§ 15, 17.

³⁰ *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418.

³¹ See post, § 271.

³² *McPhillips v. Hubbard*, 97 Ala. 512, 12 South. 711; *Smith v. Mulhern*, 57 Miss. 591. Contra, *Hoagland v. Wilcox*, 42 Neb. 138, 60 N. W. 376.

A statute authorizing the commencement of suits in the county where the garnishee resides is held not to make actions transitory which were local before, and therefore an action for trespass to land in another state cannot be maintained by summoning a garnishee residing at the place where the action is brought. *Allen v. Connecticut River Lumber Co.*, 150 Mass. 560. 23 N. E. 581.

Dependent on Compliance with Statutory Requirements.

§ 238. This topic will now be dropped with the simple statement that acquiring and maintaining jurisdiction of garnishment cases depends upon a strict compliance with the statutory requirements, and the garnishee cannot waive their observance.³³

Jurisdiction of the Property Sought to be Garnished.

Résumé.

§ 239. As we have already seen, jurisdiction cannot be acquired of the garnishment suit till the court has jurisdiction of a valid suit or judgment against the principal defendant. So, too, no jurisdiction can be acquired over the property sought to be reached without obtaining jurisdiction of the garnishee by appropriate proceedings.³⁴ These are conditions precedent, and the garnishee has no power to waive defects in these preliminary proceedings, and confer jurisdiction upon the court by voluntary appearance.³⁵ The law must be made to attach by its own substantial appointments. But, all these conditions being complied with, it does not necessarily follow that the court thereby

³³ Steen v. Norton, 45 Wis. 412, 417; Wells v. American Express Co., 55 Wis. 23, 11 N. W. 537; McDonald v. Vinette, 58 Wis. 619, 17 N. W. 319; Edler v. Hasche, 67 Wis. 653, 31 N. W. 57; McCormick Harvesting Mach. Co. v. James, 84 Wis. 600, 54 N. W. 1088; Hebel v. Amazon Ins. Co., 33 Mich. 400; Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 331, 31 N. W. 201; Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982; State v. Duncan, 37 Neb. 631, 56 N. W. 214; Gibbon v. Bryan, 3 Ill. App. 298; Gates v. Tus-ten, 89 Mo. 13, 14 S. W. 827. See, also, ante, § 6.

³⁴ See ante, §§ 234-238.

³⁵ See ante, § 238.

acquires power to pass judgment against the garnishee in respect to the debt or property of the defendant, which the plaintiff seeks by the proceedings to obtain. It may, and frequently does, happen that there is a valid suit or judgment against the principal defendant, proper proceedings against the garnishee, property under his control, or a debt due from him belonging to the defendant, and yet the court is without authority to condemn it to the satisfaction of the plaintiff's demand.

Corporeal Property beyond Territorial Limits of Jurisdiction.

§ 240. Only courts empowered to conduct proceedings purely in personam, such as courts of chancery, can require obedience to their orders in respect to property corporeally beyond the territorial limits of the court's jurisdiction. Therefore, if the garnishee have corporeal property of the defendant under his control, but beyond the territorial jurisdiction of the court, the court has no power to require him to fetch it into the jurisdiction, nor can it pass judgment against him on account thereof.³⁶

³⁶ *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 19 N. W. 72; *Montrose Pickle Co. v. Dobson & Hill's Manuf'g Co.*, 76 Iowa, 172. 40 N. W. 705; *Bowen v. Pope*, 125 Ill. 28, 17 N. E. 64; *Stevehot v. Eastern Ry. Co. (Minn.)* 63 N. W. 256; *Western Ry. Co. v. Thornton*, 60 Ga. 300; *Sutherland v. Peoria Second Nat. Bank*, 78 Ky. 250; *Miller v. Hooe*, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573; *Wheat v. Platt City & Ft. D. Ry. Co.*, 4 Kan. 370; *Buchanan v. Hunt*, 98 N. Y. 560. Compare *Lawrence v. Smith*, 45 N. H. 533

If the property held without the jurisdiction by the garnishee had been sold by him before he was summoned, he may be charged for the proceeds. *Merchants' & Manufacturers' Nat. Bank v. William A. Bader Glue Co.*, 164 Pa. St. 1, 30 Atl. 290.

The supreme court of Pennsylvania once held the contrary view, that the garnishee, having property under his control, could be

No Court can Proceed in Rem without a Res within the Jurisdiction.

§ 241. Thus far the decisions are uniform, and the principle of law upon which they are founded is much broader than the proposition we have stated; for it applies to all kinds of property, both corporeal and incorporeal. No court, proceeding in rem, can exercise any authority, unless the res is within the territory over which the court has jurisdiction. The principle is universally acknowledged. It is in attempting to apply it that the confusion and difference of opinion arises. There is no difficulty in locating property having a corporeal existence,—movables capable of being seen and seized; but how shall we locate property having no bodily substance, choses in action, contractual rights, debts not evidenced by writing, and debts evidenced by notes, bills, stocks, bonds, etc.? If they are situated at any place in particular, where is that place? Where is their situs?

How Far Residence of Owner Affects Situs of Debts.

§ 242. For most purposes,—taxation, distribution, etc.,—it has long been a recognized and established fiction of law that their situs is at the domicile of the owner. It would seem almost impertinent to remark that this is a fiction merely, and that it is impossible, from the nature of things, for intangible property to have an actual location, were it not for the fact some courts and text writers have at times appeared ob-

charged in respect to it wherever it might be. *Childs v. Digby*, 24 Pa. St. 23. But the same court has since repudiated it as bad law, and now all courts agree. *Pennsylvania Ry. Co. v. Pennock*, 51 Pa. St. 244.

livious to it.³⁷ Though it is not discussed in the opinion, Chancellor Kent, as early as 1809, seems to have taken it for granted that this fiction does not apply to debts when they are sought to be reached by garnishment in a jurisdiction where the owner does not reside.³⁸ And the same doctrine has been recognized and applied tacitly,³⁹ or positively and directly asserted,⁴⁰ in almost every court of last resort in Amer-

³⁷ *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663.

³⁸ *Embree v. Hanna*, 5 Johns. 101.

³⁹ *Moore v. Wayne* Circuit Judge, 55 Mich. 84, 20 N. W. 801; *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. 93; *Newland v. Circuit Judge of Wayne Co.*, 85 Mich. 151, 48 N. W. 544; *Broadstreet v. Clark*, 65 Iowa, 670, 22 N. W. 919; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; *Id.*, 20 Johns. 229, 9 Am. Dec. 269; *Barrow v. West*, 23 Pick. 270; *Mattingly v. Boyd*, 20 How. 128; *Fuller v. Foote*, 56 Conn. 341, 15 Atl. 760.

⁴⁰ *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113; *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, 14 N. W. 343; *Tingley v. Bateman*, 10 Mass. 343; *Burlington & M. R. Ry. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622; *Ward v. Morrison*, 25 Vt. 593; *National Fire Ins. Co. v. Chambers* (N. J. Ch.) 32 Atl. 663; *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172; *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978; *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142; *Plimpton v. Bigelow*, 93 N. Y. 596; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *East Tennessee, V. & G. Ry. Co. v. Kennedy*, 83 Ala. 462, 3 South. 852; *Connor v. Hanover Ins. Co.*, 28 Fed. 549; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870; *Mobile & O. Ry. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21; *Fithian v. New York & E. Ry. Co.*, 31 Pa. St. 114; dissenting opinion of Horton, C. J., to *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430. CONTRA, *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Sawyer v. Thompson*, 24 N. H. 510; *Wright v. Chicago, B. & Q. Ry. Co.*, 19 Neb. 175, 27 N. W. 90, 93; *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *Central Trust Co. v. Chattanooga, R. & C. R. Co.*, 68 Fed. 685; *Everett v. Connecticut Mut. Life Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616; *Atchison, T. & S. F. Ry. Co. v. Maggard* (Colo. App.) 39 Pac. 987.

ica to which the question has ever been submitted since that time; so that, notwithstanding some dissent, and more obiter, we may lay it down as a general proposition that the residence of the defendant does not affect the question as to whether the debt should be considered as having a situs within the jurisdiction of the court for the purposes of garnishment, whether such principal defendant was personally served with process within the jurisdiction or not. Under the custom of London, and until comparatively recent times in this country, garnishment could be had only when the defendant was a nonresident and owned no property within the jurisdiction which could be taken by attachment. To say that debts due nonresidents could not be garnished would wholly defeat these statutes. This theory has originated since the remedy has been allowed in suits against residents.

But, having disposed of this question, how much nearer are we to a definite answer to the original? This does not remove the difficulty; for, if this rule is not to be applied, we must seek some other means of determining whether, under the particular circumstances of the case in hand, the debt sought to be attached should be condemned to the satisfaction of the plaintiff's demand. We cannot go the length of saying that the debt is everywhere, simply because it cannot be located; or, even if this were admitted, we cannot, for that reason, dispense with appropriate process to institute the proceeding, whereby the machinery of the law shall be brought home, and caused to attach to the debt sought to be garnished. It is in seeking for this touchstone that the confusion has arisen.

Injustice Caused by Conflicting Decisions on This Question.

§ 243. The embarrassment which besets any attempt to reconcile the decisions on this important subject can be no better shown than by reference, briefly, to a few of the vicious cases to be found in the books. The supreme court of Alabama, having declared, in *Railroad Co. v. Dooley*, 78 Ala. 524, the rule which should be adopted in the courts of that state in deciding the question, refused to allow protection under a paid garnishment judgment rendered in Tennessee, simply because the court of that state failed to follow the same rule; and this although the principal defendant was personally served with process within the jurisdiction of the court of Tennessee.⁴¹ The supreme court of Mississippi refused to recognize proceedings in garnishment against a corporation in a state where it was domiciled, on the ground that the debt sought to be garnished, being for labor performed in Mississippi, where the principal defendant resided, was exempt from garnishment there, and therefore could not be reached by that process anywhere else,—a proposition utterly without support on authority. No statute can have any extraterritorial force; and, if it be said that the *lex loci contractus* should be applied, which should not, yet, certainly, the failure to apply it could be nothing more than error. The court seemed to feel the frailty of the position, for they discussed the question of situs as an additional reason, although recognizing “the numerous decisions which are cited and quoted as authority for the view opposed.”⁴² One more case will suffice for our purposes. The supreme

⁴¹ *Alabama G. S. Ry. Co. v. Chumbey*, 92 Ala. 317, 9 South. 286.

⁴² *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 12 South. 461.

court of Kansas, having held that a foreign corporation, operating a line of railroad in the state, could be charged as garnishee in respect of certain wages earned in Nebraska by an employe of the company who lived in the latter state, and who had not been personally served with process within the state of Kansas,⁴³ passed judgment against a Missouri railroad corporation for wages earned in Kansas by a resident of the latter state; the railroad company having been summoned as garnishee, in a court of Missouri, for the same debt, prior to the commencement of the laborer's suit. Except the domicile of the garnishee, the facts of the two cases were exactly the same; yet, rather than allow the court of Missouri to apply the Kansas rule, the Kansas court preferred to subject the garnishee to double liability.⁴⁴

Other Rules to Determine Situs of Debts.

§ 244. Laying aside these extraordinary cases, let us proceed to inquire what has been commonly considered by various courts in determining the question in hand. Although resting largely, if not entirely, upon the personal exemption of the garnishee, the fact that he is a nonresident has frequently been stated as the reason why he should not be charged;⁴⁵ and this has

⁴³ Burlington & M. R. Ry. Co. v. Thompson, 31 Kan. 180, 1 Pac. 622.

Want of personal service does not appear in the printed report, but see the next case.

⁴⁴ Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430.

However, let it be remembered, to the credit of this court, that the dissenting opinion of Horton, C. J., to this case is one of the most able expositions of the law on this subject to be found anywhere in the books, and will amply repay careful perusal by any one interested.

⁴⁵ See cases cited in section 15, ante.

been applied to foreign corporations doing business in a state, on the ground that, not being incorporated in the state, they can have no existence there,⁴⁶ and therefore the debt sought to be garnished cannot be or have any situs there for the purposes of garnishment. But the reader will see, by reference to the authorities, that the position is unfounded in both cases. Other cases seize upon the agreed place of payment of the debt as the fact which shall determine whether or not the situs is within the jurisdiction of the court,⁴⁷ especially in cases of debts evidenced by negotiable paper, etc.⁴⁸ But, by the weight of authority, this, even though expressly stated, is no objection to charging the debtor for it elsewhere.⁴⁹

The True Criterion to Determine Situs in Garnishment.

§ 245. It is impossible to bring harmony out of chaos. Let us for a moment consider the reason and nature of things. In its essential elements, a garnishment suit is a suit brought by the principal defendant against the garnishee, in the name and for the benefit of the plaintiff.⁵⁰ The plaintiff is empowered by law to step into the shoes of the garnishee's creditor, and acquire his rights; no more, and no less. Whatever

⁴⁶ See cases cited under section 17, ante; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *Craig v. Gunn*, 67 Vt. 92, 30 Atl. 860.

⁴⁷ *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 56 N. W. 711; *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250; *Continental Ins. Co. v. Chase* (Tex. Civ. App.) 33 S. W. 602.

⁴⁸ *Baylies v. Houghton*, 15 Vt. 626. Compare *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330.

⁴⁹ *Hannibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172. See ante, § 60.

⁵⁰ See ante, § 3.

he could do, the plaintiff, under the statutory novation of garnishment, may do, as his assignee and attorney in fact, by operation of law. Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it. Other states must recognize this right, if they recognize garnishment at all. This would seem to follow as of course, and the writer offers it as his humble opinion that this is the only true solution of the matter. The following cases declare the doctrine, and to these the reader is referred.⁵¹

Not Necessarily the Same as Determines Rights of Parties.

§ 246. Beyond this the question of jurisdiction is not involved. The question to be decided is not one of the jurisdiction of the court, but of the rights of the

⁵¹ Wyeth Hardware & Manuf'g Co. v. Lang, 127 Mo. 242, 29 S. W. 1010; Mooney v. Union Pac. Ry. Co., 60 Iowa, 346, 14 N. W. 343; German Bank v. American Fire Ins. Co., 83 Iowa, 491, 50 N. W. 53; Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. 905; Neufelder v. German-American Ins. Co., 6 Wash. 336, 33 Pac. 870; Cross v. Brown (R. I.) 33 Atl. 147; Mobile & O. Ry. Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21; Burlington & M. R. Ry. Co. v. Thompson, 31 Kan. 180, 1 Pac. 622; National Fire Ins. Co. v. Chambers (N. J. Ch.) 32 Atl. 663; East Tennessee, V. & G. Ry. Co. v. Kennedy, 83 Ala. 462, 3 South. 852; Pomeroy v. Rand, McNally & Co. (Ill. Sup.) 41 N. E. 636; dissenting opinion in Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430. As bearing on the question, see also, Mason v. Beebee, 44 Fed. 556; Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co., 45 Wis. 172; Hannibal & St. J. Ry. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Fithian v. New York & E. Ry. Co., 31 Pa. St. 114.

The following is from the opinion in Harvey v. Great Northern Ry. Co.: "While, by fiction of law, a debt, like other personal property, is for most purposes—as, for example, transmission and succession—deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction always yields to laws for attaching the property of nonresidents, because such laws necessarily assume

parties.⁵² The writer does not state this as the controlling principle in determining whether the garnishee should be charged for a particular debt. Although the court has jurisdiction of the debt, it may deem it unjust to charge the garnishee in respect of it.⁵³ The situs of property for the purpose of jurisdiction is one thing, and its situs for the purpose of determining the rights of the parties thereto is another; and the two are not necessarily the same.⁵⁴ Whatever rule each state may choose to adopt to regulate proceedings in garnishment brought in their respective jurisdictions, we insist that this is the only correct rule to determine the question when it is sought to collect a second time from one who has been charged as garnishee in a foreign jurisdiction. The garnishee is helpless, and at the mercy of the court that charged him as such. What has he done that he should be placed upon the rack by the contending courts, and stretched both ways? The supreme court of Nebraska held that a debt sought to be reached by garnishment in that state had no situs within the jurisdiction, in any such sense that it could be garnished there; but when, in an exactly similar case, a court

that the property has a situs distinct from the owner's domicile. For such purposes a debt has a situs wherever the debtor or his property can be found. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided, of course, the laws of the forum authorize it."

AN ABLE AND ELABORATE DISCUSSION of this question will also be found in *National Fire Ins. Co. v. Chambers*, above.

⁵² *Mason v. Beebee*, 44 Fed. 556, 563.

⁵³ Such a case is *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. 70.

⁵⁴ *Mason v. Beebee*, 44 Fed. 556, 559; *Cross v. Brown* (R. I.) 33 Atl. 147, 149.

of another state held that it had jurisdiction, and charged the garnishee, and the garnishee sought the protection of this judgment in Nebraska, the court of that state declared the protection to be perfect. This, we submit, is the correct doctrine; the court of the foreign state having jurisdiction, because the creditor could have sued there.⁵⁵

⁵⁵ Chicago, B. & Q. Ry. Co. v. Moore, 31 Neb. 623, 48 N. W. 475.

The following is from the opinion in this case: "The material inquiry, therefore, is, did the Iowa court obtain jurisdiction over the debt here sued for, so as to subject it to the claim of the plaintiff in garnishment? It appears that, in the suit commenced by Grove against Moore in the justice court in Iowa, notice of garnishment was duly served upon the railroad company; that it appeared and answered, disclosing its indebtedness to Moore in the sum of \$25.92, and in obedience to the order of the justice the company paid the money into court. Moore was also duly served by publication, and judgment was rendered against him as a nonresident. These facts, under the statutes and decisions of Iowa, conferred jurisdiction over the debt due from the garnishee. * * * The judgment in the garnishment suit set up by the plaintiff in error, being valid and binding upon the parties thereto in the state where rendered, is entitled to full faith and credit in this state, and cannot be collaterally attacked. * * * In reaching the conclusion we have, we do not overrule or in any manner modify the rule laid down in *Wright v. Railroad Co.*, 19 Neb. 175, 27 N. W. 90. We are simply giving such faith and credit to the judgment of a sister state as comity between states demands." Cited with approval in *Singer Manuf'g Co. v. Fleming*, 39 Neb. 679, 58 N. W. 226, 229. As supporting this rule, see, also, *Connors v. Hanover Ins. Co.*, 28 Fed. 549; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484.

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CHAPTER XII.

AFFIDAVIT, SUMMONS, SERVICE, RETURN, NOTICE TO DEFENDANT, AND DISSOLUTION PROCEEDINGS.

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Affidavit.

Jurisdictional Prerequisites—A Complaint—Entitling.

§ 247. Garnishment is anomalous, not only in its scope, but also in its practice; and, as it is entirely statutory, the methods of procedure must be such as the statute authorizing it points out and contemplates. In the first instance, the affidavit is the source of authority to the court, giving it jurisdiction to issue garnishment summons. Afterwards it stands for the plaintiff's declaration or complaint against the garnishee in some states,¹ and, being in the nature of a complaint, it is held that it should be tested by the same rules.² The affidavit need not be entitled in the

¹ Bethel v. Linn, 63 Mich. 464, 30 N. W. 84; Steen v. Norton, 45 Wis. 412.

² Everdell v. Sheboygan & Fond du Lac Ry. Co., 41 Wis. 395, 401.

cause, provided it shows, upon its face, the case in which it is intended to be used; but it would probably be good practice to so entitle it.⁴

Misjoinder of Actions—One Affidavit for Two Writs.

§ 248. The statutes authorize charging the garnishee for two classes of liability,—indebtedness to the defendant, and possession of his property; and, as they do not require proceedings to be separate, the garnishee may be charged as debtor and custodian under the same affidavit, although the joinder of trover and assumpsit would be bad in any other form of action.⁴ So, too, the same affidavit may be ground for issuing several writs to garnishees liable severally only.⁵ Likewise, one affidavit, if containing sufficient averments, may be the foundation for issuing both the attachment and the garnishment writ.⁶

Judgment can be Only for the Liability Charged in the Affidavit.

§ 249. The plaintiff can require the garnishee to answer only to the grounds of liability charged in the affidavit, and, therefore, if it only alleges indebtedness to the defendant, the plaintiff cannot question him concerning property in his possession belonging to the

³ Burnham v. Doolittle, 14 Neb. 214, 15 N. W. 606. ➤

⁴ Peninsular Stove Co. v. Circuit Judge of Wayne Co., 85 Mich. 400, 48 N. W. 549; Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078.

⁵ State Sav. Bank v. Circuit Judge of Wayne Co., 95 Mich. 100, 54 N. W. 632; Curtis v. Henrietta Nat. Bank, 78 Tex. 260, 14 S. W. 614; Goll v. Hubbell, 61 Wis. 293, 297, 20 N. W. 674; Ahrens Ott Manuf'g Co. v. Patton Sash, Door & Building Co., 94 Ga. 247, 21 S. E. 523; Curry v. Woodward, 50 Ala. 258.

⁶ Carper v. Richards, 13 Ohio St. 219.

defendant, or vice versa;⁷ nor can he be charged on a ground not alleged, even though he should admit liability.⁸ But, upon an affidavit charging that the garnishee is indebted to the defendant, without further allegation, he may be charged for a debt which he owes to either of the defendants.⁹

Averments—Positive and Alternative—Qualifications of Affiant and Magistrate.

§ 250. Whether an affidavit alleging both grounds of liability in the disjunctive (has property, etc., or is indebted, etc.) is sufficient, is not agreed; but it is generally held sufficient.¹⁰ The affidavit must be made by one having personal knowledge of the essential facts deposed to,¹¹ and authorized to make it,¹² and

⁷ Mack v. Brown, 20 Mich. 335; Nash v. Gale, 2 Minn. 311 (Gil. 265). See, also, ante, § 50, and post, § 291. Contra, Prince v. Heenan, 5 Minn. 347 (Gil. 279).

⁸ Botsford v. Simmons, 32 Mich. 352. Compare Connor v. Third Nat. Bank, 90 Mich. 328, 51 N. W. 523; Goll v. Hubbell, 61 Wis. 293, 20 N. W. 674, 21 N. W. 288.

⁹ Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078.

¹⁰ Russell v. Ralph, 53 Wis. 328, 10 N. W. 518; Everdell v. Sheboygan & Fond du Lac R. Co., 41 Wis. 395, 401; White v. Lynch, 26 Tex. 195. Contra, Prince v. Heenan, 5 Minn. 347 (Gil. 279), overruled in Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078. Compare Weimeister v. Manville, 44 Mich. 408, 6 N. W. 859; Jones v. Peek, 101 Mich. 389, 59 N. W. 659.

¹¹ Weimeister v. Manville, 44 Mich. 408, 6 N. W. 859; Streissguth v. Reigelman, 75 Wis. 212, 43 N. W. 1116.

But an affidavit sworn to by one of several plaintiffs, as upon the knowledge of all, presumes the personal knowledge of the deponent, and is sufficient. Williams v. International Grain & Stock Board, 90 Mich. 80, 57 N. W. 1089.

¹² Wetherwax v. Paine, 2 Mich. 555; Jackson v. Shipman, 28 Ala. 488; Willis v. Lyman, 22 Tex. 268; First Nat. Bank v. Graham (Tex.

before a proper person,¹³ and the required averments must be so positive that perjury can be assigned upon them. This is the test of their sufficiency.¹⁴

What Averments are Essential.

§ 251. What facts must be shown by the affidavit depend entirely upon the requirements of the statute under which the proceedings are conducted. As we have already seen, the law authorizing this mode of procedure is in derogation of common law, and, when put into practice, operates as a compulsory statutory assignment to the plaintiff of the defendant's property rights.¹⁵ Therefore, every fact which the statute authorizing the proceedings requires to be deposed to in the affidavit for garnishment must be averred therein, or the court will acquire no jurisdiction. "The plaintiff in the principal suit may resort to this extraordinary remedy at his own will, but this is true only *sub modo*. It is not the policy of the statute to place this anomalous action, like ordinary actions, at the mere discretion of the plaintiff, or to give courts unqualified jurisdiction of it, as in ordinary actions, where every

App.) 22 S. W., 1101. Compare *Miller v. Chicago, M. & St. P. Ry. Co.*, 58 Wis. 310, 17 N. W. 130; *Trenton Banking Co. v. Haverstick*, 11 N. J. Law, 171; *Everett v. Connecticut Mut. Ins. Co.*, 4 Colo. App. 509, 36 Pac. 616.

¹³ *James v. Jenkins*, Hemp. 189, Fed. Cas. No. 7,181a.

Held, that an affidavit sworn to before a justice of the peace is sufficient to sustain the issuing of a writ from the circuit court; and any one who may administer oaths may take the affidavit, though the statute directs that it be sworn to before the clerk of the court. *Horat v. Jackel*, 59 Ill. 139.

¹⁴ *Russell v. Ralph*, 53 Wis. 328, 10 N. W. 518; *Greene v. Tripp*, 11 R. I. 424. Compare *Freer v. White*, 91 Mich. 74, 51 N. W. 807.

¹⁵ See ante, §§ 6, 192.

person can become a plaintiff, have process, and put the court's jurisdiction in motion on demand. The plaintiff in garnishment proceedings, as in attachment on mesne process, replevin, and the like, can put in motion the jurisdiction of the court only by complying with the statutory prerequisites; and the court takes jurisdiction of the proceeding only upon the plaintiff's compliance with the preliminaries which the statute makes the condition of jurisdiction. Failure of the affidavit is, therefore, failure of jurisdiction over the subject-matter."¹⁶ And the affidavit fails unless it contains every averment the statute requires it to contain.¹⁷

¹⁶ *Steen v. Norton*, 45 Wis. 412.

¹⁷ ILLUSTRATIVE CASES: The following are a few of the cases in which the doctrine has been declared, and the affidavit held insufficient, because of failure to contain the averments required by the statute under which it was made:

Failure to state that the garnishee's indebtedness to the defendant or the property in his possession was not exempt from garnishment. *Steen v. Norton*, 45 Wis. 412; *Rasmussen v. McCabe*, 46 Wis. 600. 1 N. W. 196.

An affidavit that the defendant has no property subject to execution in the Western district of Texas does not comply with the statutes, requiring an affidavit that he has no property in the state. *Booth v. Denike*, 65 Fed. 43.

Failure to state the amount of the plaintiff's claim over and above all set-off. *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243; *Stickley v. Little*, 29 Ill. 315.

Failure to state whether the plaintiff's claim is founded upon contract, express or implied, or upon judgment or decree, or to identify the demand sworn to as the one sued on. *Weimeister v. Manville*, 44 Mich. 408, 6 N. W. 859; *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588.

Failure to state the facts authorizing the issuance of the writ. *Schurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478. 14 S. W. 148.

For further authority upon this question, see the following deci-

What Averments are Unnecessary.

§ 252. On the other hand, an affidavit containing all the averments which the statute requires is sufficient. The only jurisdictional facts are those which it declares shall be alleged in the affidavit. However reasonable or proper it may appear that any fact should be alleged, the affidavit cannot be attacked as insufficient to confer jurisdiction because of failure to state that fact, unless the statute under which the proceedings are conducted requires that it shall be stated in the affidavit. This would seem to be so almost of necessity; for, if the statute could not be considered as the guide of the pleader in drafting the affidavit, he could have none, and no one could be certain that any affidavit were sufficient till the supreme court had stamped it with its approval. The statute is the only test.¹⁸

Amending the Affidavit.

§ 253. An affidavit conforming to the requirements of the statute gives the court jurisdiction, and any

sions: *Russell v. Ralph*, 53 Wis. 328, 10 N. W. 518; *Wells v. American Exp. Co.*, 55 Wis. 23, 34, 11 N. W. 537; *Mack v. Brown*, 20 Mich. 335; *Farwell v. Chambers*, 62 Mich. 316, 28 N. W. 859; *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 331, 31 N. W. 201; *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *Bowers v. Continental Ins. Co.*, 65 Tex. 51.

SWORN COMPLAINT IN LIEU OF AFFIDAVIT: An affidavit without the required averment that the defendant refuses to apply upon the judgment the debt or property sought is fatally defective, unless cured by the sworn complaint, filed at the same time, and the complaint will not cure the defect unless it avers every fact required to be shown by the affidavit. *Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617.

¹⁸ *Beck v. Cole*, 16 Wis. 100; *Everdell v. Sheboygan & Fond du Lac Ry. Co.*, 41 Wis. 395, 401; *Rasmussen v. McCabe*, 43 Wis. 471;

other facts, such as that the affiant is attorney or agent for the plaintiff, may be stated by way of recital;¹⁹ or, if deemed proper, as a part of the affidavit, the

State Sav. Bank v. Circuit Judge of Wayne Co., 95 Mich. 100, 54 N. W. 632; Nash v. Gale, 2 Minn. 311 (Gil. 265); Carper v. Richards, 13 Ohio St. 219; Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004.

ILLUSTRATIVE CASES: The following are a few of the cases decided under this principle:

Not necessary to state that a suit is pending against the principal defendant, nor that the plaintiff's claim is due. State Sav. Bank v. Circuit Judge of Wayne Co., 95 Mich. 100, 54 N. W. 632.

It is not necessary to aver that the garnishee is a corporation, or has property or is doing business within the state. Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581; Brauser v. New England Ins. Co., 21 Wis. 516.

The contrary seems to be held by the supreme court of Michigan in Ettelsohn v. Fireman's Fund Ins. Co., 64 Mich. 331, 31 N. W. 201, yet it can hardly be said that the court in that case intended to depart from the rule stated in the text, or, if so, it is out of the usual line of decisions.

"Dixon, C. J. * * * I cannot agree with the learned counsel for the defendants in the construction which he seeks to establish for the act of March 14, 1864. He contends that, before the process of garnishment therein provided for can lawfully issue, there must be an affidavit, made and filed in the proceeding, stating that the defendants in the principal action are indebted to the plaintiff. * * * Now, while I may fully agree with the counsel as to the propriety of requiring such affidavit, and even security to be given by the plaintiff, before the property and effects of the defendants should be thus summarily seized and sequestered in the hands of their debtors, and as to the wrong and injustice which may be done if such affidavit is not required, I still can find nothing in the act

¹⁹ Wetherwax v. Paine, 2 Mich. 555; Fremont Cultivator Co. v. Fulton, 103 Ind. 393, 3 N. E. 135; First Nat. Bank v. Graham (Tex. App.) 22 S. W. 1101. Compare Miller v. Chicago, M. & St. P. Ry. Co., 58 Wis. 310, 17 N. W. 130; Mandel v. Peet, 18 Ark. 236; Gilkeson v. Knight, 71 Mo. 403; Austin v. Latham, 19 La. 88; Lithgow v. Byrne, 17 La. Ann. 8.

court may allow them to be supplied, *nunc pro tunc*, by amendment, in the same manner as it might allow the papers in any cause before it to be amended;²⁰ or the errors may be waived;²¹ but failure to state jurisdictional facts will not be cured by amendment,²² nor

which would justify such construction. The argument may be a good one to address to the legislature, but not to this court. The language of the act is very plain, that, in an action in the circuit court, founded upon contract, the plaintiff, by making and filing the affidavit therein prescribed, shall be entitled to the process." *Orton v. Noonan*, 27 Wis. 572, 577.

As to a statement of amount of plaintiff's demand, see, also, post, § 392.

"The requisites of the affidavit for garnishment in that court are prescribed by section 3716, Rev. St. The affidavit here conformed to those requirements. This was sufficient to give the justice jurisdiction, without stating the amount of the plaintiff's claim against the defendant, over and above all set-offs, as required in an affidavit for garnishment in the circuit court." *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. 927.

"This objection is based, in part, upon the supposition that, to properly institute a proceeding of this kind, the affidavit must necessarily show that the person to be summoned has property of the judgment debtor in his possession or under his control, or is indebted to him, and that a statement of mere belief, without more, will not answer. Referring to the statute, however, we find that nothing further is required to be stated. * * * Mere belief, therefore, is all that the statute contemplates, and, consequently, all that courts have the right to exact, in affidavits of this kind." *Burnham v. Doolittle*, 14 Neb. 214, 15 N. W. 606.

²⁰ Slight misnomer of the garnishee held amendable. *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412. Compare *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588.

²¹ *Goll v. Hubbell*, 61 Wis. 293, 296, 20 N. W. 674; *Stevens v. Dillman*, 86 Ill. 233; *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393, 3 N. E. 135.

²² *Schurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478, 14 S. W. 148; *Steen v. Norton*, 45 Wis. 412. Compare *Freer v. White*, 91 Mich. 74,

by a statement of them in the writ of garnishment,²³ nor by proof of them, when the objection is made that they are not stated.²⁴ Such defects cannot be waived by the garnishee,²⁵ and are not cured by a general ap-

51 N. W. 807. *Contra*, Sanb. & B. Ann. St. Wis. § 2731a; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412; *Burkett v. Bowen*, 118 Ind. 378, 21 N. E. 38.

AMENDMENTS IN FEDERAL COURTS: Held, that the affidavit may be amended in the United States courts, though not allowable by the courts of the state where the action is tried. *Booth v. Denike*, 65 Fed. 43.

²³ *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 331, 31 N. W. 201.

²⁴ *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215.

PROOF OF SWEARING TO AFFIDAVIT: Upon an issue of fact as to whether the affidavit was sworn to, held, that the finding of the trial court is conclusive. *Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

²⁵ *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588; *Steen v. Norton*, 45 Wis. 412; *Bowers v. Continental Ins. Co.*, 65 Tex. 52.

THE GARNISHEE MAY WAIVE ANY DEFECT IN THE AFFIDAVIT: "If personal jurisdiction is acquired over the garnishee, but not over the defendant, the plaintiff must still proceed in rem against the effects in the hands of the garnishee. But, when the court already has jurisdiction of the person of the defendant, the proceedings against the garnishee are much in the nature of proceedings to bring in additional parties defendant; and, in such a case, when the garnishee is brought in, the action is in personam as to all the parties, and takes on a double aspect,—that of an action against the defendant to recover judgment for the debt, and that of a sort of a creditors' bill against him and the garnishee, to reach assets in the hands of the garnishee, to be applied in satisfaction of the judgment. In such a case, the garnishee affidavit and summons are the process by which personal jurisdiction is obtained over the additional party, the garnishee; and, as to himself, he may waive such process by voluntarily appearing. It is true that the garnishee cannot waive the rights of the defendant. The defendant, as well as the garnishee, may object to the failure to file a proper affidavit; and the defendant is, in certain cases, entitled to notice of the bringing in

pearance in the action by the principal defendant without raising the objection.²⁶

Proper Phrasing of Essential Averments.

§ 254. Generally, an affidavit in the exact words of the statute will be sufficient, if perjury can be assigned upon it,²⁷ and it is always policy to follow the statute as nearly verbatim as is possible, and at the same time keep the language of the affidavit direct and positive; but the substance is all that is necessary, and the court will judge whether the substantial requirements of the statute are found in the affidavit.²⁸

of the garnishee, and of the time set for the disclosure. But, if personal jurisdiction has been obtained over the defendant, none of these steps are jurisdictional, as to him. On the contrary, the failure to take those steps properly is, as to him, a mere irregularity, occurring after jurisdiction has been once acquired, and does not render void a judgment charging the garnishee; but such judgment is binding on all the parties until set aside." *Aultman, Miller & Co. v. Markley* (Minn.) 63 N. W. 1078.

²⁶ See ante, §§ 230-232.

²⁷ *Russell v. Ralph*, 53 Wis. 328, 10 N. W. 518; *Hinkley v. St. Anthony Falls Water-Power Co.*, 9 Minn. 55 (Gil. 44).

²⁸ The statutory clause, "has good reason to believe," is substantially contained in the words "verily believes," the latter being the stronger. *Russell v. Ralph*, 53 Wis. 328, 10 N. W. 518.

"Has good reason to believe and does believe" is not contained in the statement of belief alone. There must be a reason for the belief, though not stated. *Prince v. Heenan*, 5 Minn. 347 (Gil. 279).

The statute requiring the statement of a fact is not complied with by a statement of belief. *Greene v. Tripp*, 11 R. I. 424.

An affidavit that the affiant believes the statements of the bill to be true held insufficient, though the garnishee answered, admitting the facts stated on belief. *Patterson v. Bowie*, 1 Cranch, C. C. 425, Fed. Cas. No. 10,825.

An affidavit that the attorney "has reason to believe" that his client "will apprehend the loss" of his debt, etc., is insufficient. *Knox v. Summers*, 66 Ga. 256.

Time of Swearing to and Filing the Affidavit.

§ 255. Not only must the affidavit be made in compliance with the statute, but it must be filed before the writ issues. Till the proper affidavit is filed, the court has no jurisdiction to issue the writ.²⁹ When the statute does not require the affidavit to be made at the time of or after commencement of the suit, but provides that it shall be filed with the clerk "at the time of or after the commencement of suit," an affidavit sworn to before the original suit is commenced, but on the same day, and stating that a suit is about to be commenced, is sufficient to give the court jurisdiction.³⁰

The Summons or Writ of Garnishment.*Issues of Course, Pursuant to Affidavit.*

§ 256. The proper affidavit being filed, the writ issues of course. There is nothing to find except that the affidavit has been filed as required by statute. The duty to issue the writ is ministerial, not judicial.³¹

²⁹ Black v. Brisbin, 3 Minn. 360 (Gil. 253), 74 Am. Dec. 762; Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44, 49); Steen v. Norton, 45 Wis. 412; Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537; State v. Duncan, 37 Neb. 631, 56 N. W. 214; Garland v. Sperling (N. M.) 30 Pac. 925; Louisville, N. A. & C. Ry. Co. v. Lake, 5 Ind. App. 450, 32 N. E. 590; Bryant v. Bank of California (Cal.) 7 Pac. 128.

ENTERING AFFIDAVIT ON RECORD: The affidavit need not be transcribed on the record, unless the statute requires it. Carper v. Richards, 13 Ohio St. 219.

³⁰ Millard v. Lenawee Circuit Judge (Mich.) 64 N. W. 1046.

³¹ Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44); Burnham v. Doolittle, 14 Neb. 214, 15 N. W. 606.

ATTACHMENT ISSUES FIRST: In garnishment under attach-
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When issued, it commands the officer to require the garnishee to impound the debt or property attached, and to appear and answer concerning the allegations of the affidavit, and nothing else.³²

Special Notice.

§ 257. When the statute requires the officer serving the writ to serve with it, upon the garnishee, a written notice of the property attached, nothing is attached which is not stated in the written notice. Although a notice in general terms is sufficient, the knowledge of the garnishee that the property of the defendant firm is sought to be reached will not aid a notice stating only that the property of one of the defendants is attached.³³ When there is no provision of statute requiring a special notice to be served upon the garnishee, stating what property is sought to be reached, a plain writ, alone, will ordinarily answer every purpose, and attach in the garnishee's hands any property or debt belonging to the defendant.³⁴ When it is sought to attach property not apparently belonging to the defendant, a notice to that effect should accompany the summons.³⁵

ment, the attachment must issue before the garnishment. *Donald v. Nelson*, 95 Ala. 111, 10 South. 317.

³² *Mack v. Brown*, 20 Mich. 335; *Botsford v. Simmons*, 32 Mich. 352; *Nash v. Gale*, 2 Minn. 310 (Gil. 265). But see *Prince v. Heenan*, 5 Minn. 347 (Gil. 279).

³³ *Hayden v. National Bank of State of New York*, 130 N. Y. 146, 29 N. E. 143. Compare *Carter v. Koshland*, 12 Or. 492, 8 Pac. 556.

³⁴ *Emery v. Seavey*, 148 Mass. 566, 20 N. E. 177; *Purves v. Lex* (Pa. Sup.) 9 Atl. 167.

Held, that such notice is proper when specific property is sought to be attached, but unnecessary to the attachment of indebtedness, because impracticable. *Bell v. Wood*, 87 Ky. 56, 7 S. W. 550.

³⁵ *First Nat. Bank v. Leppel*, 9 Colo. 594, 13 Pac. 776.

The Writ is a Process, and must Possess Process Elements.

§ 258. The garnishment writ serves both as a summons and as an attachment,³⁶ is a process and not a pleading,³⁷ should run in the name of the people of the state,³⁸ be tested of and returnable to the court having jurisdiction of the action against the principal defendant,³⁹ be issued and signed by its clerk,⁴⁰ and bear

³⁶ Paul v. Bird, 25 N. J. Law, 559.

³⁷ Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252; Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44); Boyd v. Chesapeake & O. C. Co., 17 Md. 195, 79 Am. Dec. 646; Curry v. Woodward, 50 Ala. 258; Lady Ensley Furnace Co. v. Rogan, 95 Ala. 594, 11 South. 188; Moore v. Wayne Circuit Judge, 55 Mich. 84, 20 N. W. 801.

"It occurred to me, at first, that we might treat this order to the garnishee, not as process in the legal sense, but as merely ancillary to the attachment, designed only to warn the garnishee, and tie up the effects in his hands, and not to be tested by the strict rules governing process constituting the basis of judicial proceedings. But this theory will not bear reflection. As to the garnishee it is the only process. Against him, it is the sole basis of judgment. The garnishment is a suit against him,—process in the legal sense, not pleading, and subject to a motion to quash for inherent defects in the order. Upon it may rest important litigation and trial of issue between the garnishee and the plaintiff." Coda v. Thompson, 39 W. Va. 67, 19 S. E. 548.

Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44).

³⁸ CONSTITUTIONAL LAW: When the constitution directs that all process shall run in the name of the people of the state, the legislature has no authority to confer jurisdiction by garnishment process which does not. Manville v. Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary, 328.

³⁹ Garland v. McKittrick, 52 Wis. 264, 9 N. W. 160; First Nat. Bank of Gadsden v. Dunn (Ala.) 14 South. 559; West v. Harvey, 81

⁴⁰ Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252.

Held, that a justice of the peace may issue garnishment in aid of suits in the circuit court. Thompson v. Carper, 11 Humph. (Tenn.) 542.

its official seal.⁴¹ Under some of the statutes, no writ is required, but a summons may be issued by the plaintiff's attorney,⁴² or the officer who serves the writ in the main action;⁴³ but a writ or summons issued by a person, officer, or court not authorized by law, is absolutely void.⁴⁴

Ga. 711, 8 S. E. 449; Toledo, W. & W. Ry. Co. v. Reynolds, 72 Ill. 487; Hughs v. Ft. Dearborn Nat. Bank, 47 Ill. App. 567; Smith v. Dickson, 58 Iowa, 444, 10 N. W. 850; Gould v. Meyer, 36 Ala. 565; New York, L. E. & W. Ry. Co. v. Cookson, 45 N. J. Law, 302.

⁴¹ Williams v. Van Metre, 19 Ill. 293; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252.

⁴² Hinkley v. St. Anthony Falls Water-Power Co, 9 Minn. 55 (Gil. 44).

⁴³ Steen v. Norton, 45 Wis. 412, 415; Manville v. Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary, 232; First Nat. Bank of Nashville v. First Nat. Bank of Tupelo (Miss.) 16 South. 904.

"The clerk of this court issues the writ of attachment,—the process of this court. * * * There is no provision of the Revised Statutes nor of the Iowa Code requiring either of these notices to proceed from the clerk. * * * And since the notice is to be given by the officer, and as a part of the levy he is making, why require that the officer shall have this notice signed by the clerk, and bear the teste of the chief justice? These considerations, as well as the uniform practice heretofore obtaining in this court, and which is based on the uniform practice of the state courts of Iowa, justify the conclusion that the notice of garnishment which is given by the officer who is executing a writ of attachment is not a 'process,' within the meaning of section 911, Rev. St.; and that the notice of garnishment herein was not required to bear the teste of the chief justice of the United States, or the seal of this court, and same was properly signed by the marshal." Wile v. Cohn, 63 Fed. 759.

⁴⁴ Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252; Stephenson v. Campbell, 30 Ga. 159; First Nat. Bank of Gadsden v. Dunn (Ala.) 14 South. 559. Compare Clarke v. Gaither, 6 Ala. 139; Donald v. Nelson, 95 Ala. 111, 10 South. 317.

Entitling—One Summons for Two Suits.

§ 259. As the garnishment is ancillary to the main action,⁴⁵ it has been held that the writ should be entitled therein.⁴⁶ But, on the other hand, it has been held that one summons may serve as notice in different suits.⁴⁷

Executors, Corporations, etc.—How Named as Garnishees.

§ 260. The summons should be directed to the garnishee, and in the capacity in which it is expected to charge him; for judgment can be rendered only against the party named in the summons.⁴⁸ Thus, if it is intended to charge a corporation as garnishee, and the summons is directed to the officer on whom the service is made, the court will acquire no jurisdiction over the corporation, and has no power to render judgment against it as garnishee. The summons should be directed to the garnishee by its corporate name.⁴⁹

⁴⁵ See ante, § 2.

⁴⁶ Jackson v. Shipman, 28 Ala. 488.

⁴⁷ Quarles v. Porter, 12 Mo. 76.

⁴⁸ Pratt v. Sanborn, 63 N. H. 115.

⁴⁹ Clafin v. Iowa City, 12 Iowa, 284; Moor v. Walker, 46 Iowa, 164; Union Bank of Rochester v. Union Bank of Sandusky, 6 Ohio St. 254; Daniels v. Meinhard, 53 Ga. 359; Varnell v. Speer, 55 Ga. 132; Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3; Insurance Co. of North America v. Friedman, 74 Tex. 56, 11 S. W. 1046; First Nat. Bank of Montague v. Robertson, 3 Tex. Civ. App. 150, 22 S. W. 100.

But it is sufficient to state garnishee's name. It need not show whether it is a foreign or domestic corporation. That appears by the affidavit. Williams v. International Grain & Stock Board, 90 Mich. 80, 57 N. W. 1089.

The summons need not show whether the garnishee is a corporation or a partnership. United States Express Co. v. Bedbury, 34 Ill. 459.

But when one was described in a summons as agent for several companies, and commanded to appear and answer "what said com-

Likewise, service of garnishment upon one as an individual will not bind property held by him as executor; and no judgment could be rendered against him in that capacity, though he appear and disclose liability as such.⁵⁰

All Obligees must be Named in, to Reach Joint Liability.

§ 261. If it is intended to reach property in the joint possession of several persons, or debts due from them jointly, all should be named in the summons. If this is not done, and the garnishees are liable jointly only, the suit must fail for the nonjoinder,⁵¹ unless the

panies named above are indebted to said defendant, or what property or effects you have in your hands belonging to the defendant," held, that one of said companies, having appeared and answered, and offered to pay the money into court, had waived the defect in the summons, and could not afterwards urge it. *Flournoy v. Rutledge*, 73 Ga. 735. See, also, *Moody v. Alter*, 12 Heisk. (Tenn.) 142. Without such waiver such a summons would be no garnishment of the companies. *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. 65.

⁵⁰ *Tillinghast v. Johnson*, 5 Ala. 514.

When the addition to the name of the garnishee in the summons may be treated as surplusage, he may be charged as an individual. *Hewitt v. Wheeler*, 23 Conn. 284.

If an administrator had become so personally obligated that the defendant could sue him in his individual capacity, he may be held as garnishee in the same manner. *Hoyt v. Christie*, 51 Vt. 48.

⁵¹ *Wilson v. Albright*, 2 G. Greene (Iowa) 125; *Bean v. Barney*, 10 Iowa, 498; *Ellicott v. Smith*, 2 Cranch, C. C. 543, Fed. Cas. No. 4,387; *Wellover v. Soule*, 30 Mich. 481; *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997; *Pettes v. Spalding*, 21 Vt. 66; *Knapp v. Levanway*, 27 Vt. 298; *Rix v. Elliot*, 1 N. H. 184; *Hudson v. Hunt*, 5 N. H. 538; *Atkins v. Prescott*, 10 N. H. 120; *Frizzle v. Willard*, 37 Ark. 478; *Huskill v. Johnson*, 24 Ga. 625; *O'Connell v. Ackerman*, 62 Md. 337. *Contra*, *Brealsford v. Meade*, 1 Yeates (Pa.) 488.

Held, that partners may be summoned by process addressed to them by their firm name. *Bushnell v. Allen*, 48 Wis. 460, 4 N. W.

objection is waived by not pleading it in abatement.⁵² Moreover, it has been held that, if carried to judgment without objection being made, the paid judgment will afford the garnishee and his co-obligee no protection when afterwards sued jointly by the defendant.⁵³ But, if all the principals are summoned as garnishees, and those not named in the process were sureties merely, the proceedings are always held valid.⁵⁴

Joint and Several Obligees as Garnishees.

§ 262. When several persons are jointly and severally liable, although any one of them may be charged for the whole liability, on a process directed to him alone, and payment of the judgment thus rendered will

599; *United States Express Co. v. Bedbury*, 34 Ill. 459. Contra, *Sheffield v. Barber*, 14 R. I. 263. At least, when part of them are nonresidents of the state. *Peck v. Barnum*, 24 Vt. 75. The process cannot be amended by adding the omitted names after return. *Knapp v. Lev-away*, 27 Vt. 298.

The garnishees may be described by their firm name or individual names, at the option of the plaintiff, when the statute authorizes suits against partnerships by their firm name. *Whitman v. Keith*, 18 Ohio St. 134.

⁵² *Sabin v. Cooper*, 15 Gray. 532.

The rule that nonjoinder must be pleaded, to avail, does not apply to garnishment proceedings, in which the garnishee cannot know what the plaintiff seeks to reach until issue is taken on the answer made, after which the garnishee has no opportunity to plead. *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997. Compare *Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

⁵³ *Wetherwax v. Paine*, 2 Mich. 555, 557; *Hirth v. Pfeifle*, 42 Mich. 31, 3 N. W. 239. Contra, *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436; *Hawley v. Atherton*, 39 Conn. 309. Compare *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599; *Hutchinson v. Eddy*, 29 Me. 91; *Sangster v. Butt*, 17 Ind. 354.

⁵⁴ *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. 927; *Noble v. Thompson Oil Co.*, 69 Pa. St. 409; *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378.

protect all,⁵⁵ yet any one of those not summoned may pay the debt, or deliver the property, after the garnishment summons is served, and such payment will discharge the garnishee.⁵⁶

Garnishees Severally Liable, Named as Joint.

§ 263. On the other hand, several persons cannot be held as joint garnishees, unless their liability to the defendant is joint; and this is so whether it is sought to charge them as indebted to the defendant, or in possession of his property.⁵⁷ But this objection may be waived by the garnishee.⁵⁸

⁵⁵ Travis v. Tartt, 8 Ala. 574; Macomber v. Wright, 35 Me. 156; Speak v. Kinsey, 17 Tex. 301; Ladd v. Baker, 26 N. H. 76, 57 Am. Dec. 355.

⁵⁶ Jewett v. Bacon, 6 Mass. 60; Hathway v. Russell, 16 Mass. 473; Sabin v. Cooper, 81 Mass. 532; Ladd v. Baker, 26 N. H. 76, 57 Am. Dec. 355; Treadwell v. Brown, 41 N. H. 12.

⁵⁷ Ball v. Young, 52 Mich. 476, 18 N. W. 225; Lyon v. Ballentine, 63 Mich. 97, 103, 29 N. W. 837; Black v. Dawson, 82 Mich. 485, 491, 46 N. W. 793; Thorn v. Woodruff, 5 Ark. 55; Bender v. Bridge, 18 Ark. 291.

CREDITS AND DEBTS PART SEVERAL AND PART JOINT: A summons to answer for indebtedness to the defendants means a joint liability to all, and is ineffectual as an attachment of a debt due to a part of the defendants. McBride v. Protection Ins. Co., 22 Conn. 248.

A writ commanding A., B., and C. to appear and answer what they, or either of them, are indebted to the defendant, would be sufficient to reach either joint or several liability. Treadway v. Andrews, 20 Conn. 384.

"When two or more are summoned as trustees, according to the statutory form, with nothing in the writ added to indicate in which capacity they are required to disclose, whether as to their joint or their several liability, they are before the court in their joint as well

⁵⁸ Goll v. Hubbell, 61 Wis. 293, 20 N. W. 674, and 21 N. W. 288; Curry v. Woodward, 50 Ala. 258, 53 Ala. 371.

When Returnable.

§ 264. The summons must be made returnable, and the answer of the garnishee directed to be made, in the manner and within the time during which the statute requires writs to be made returnable, and if directed to any other time the court will acquire no jurisdiction.⁵⁹

Must be in Writing and Contain Statutory Clauses.

§ 265. The writ or summons must be in writing,⁶⁰ and must contain the provisions and clauses, and be substantially in the form, prescribed by the statute.⁶¹

as their several capacity, and are chargeable for all their indebtedness to the principal debtor, joint as well as several, if all the joint debtors are before the court as trustees." *Lamson v. Bradley*, 42 Vt. 165.

When partners, as such, are made garnishees, only partnership obligations are attached. *Coverly v. Braynard*, 28 Vt. 738.

When a number of persons are named in a writ as trustees, it will be presumed that they are proceeded against severally, unless they are declared against jointly. *Ingraham v. Olcock*, 14 N. H. 243.

⁵⁹ *McDonald v. Vinette*, 58 Wis. 619, 17 N. W. 319; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57; *Padden v. Moore*, 58 Iowa, 703, 12 N. W. 724; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548; *Houston v. Porter*, 10 Ired. (N. C.) 174. Compare *Miller v. Whitescarver*, 23 W. Va. 10; *Wile v. Cohn*, 63 Fed. 759; *Manville v. Battle Mountain Smelting Co.*, 17 Fed. 126; 5 *McCrary*, 232; *Walker v. Tewksbury*, 67 Me. 496; *Burt v. Wayne Circuit Judge*, 82 Mich. 251, 46 N. W. 380.

But held immaterial that the summons did not mention any time for making answer. *Hearn v. Adamson*, 64 Ga. 608.

When the day of the week and the day of the month mentioned as the return day do not agree, the writ is not bad. The month day controls. *State Savings Bank v. Circuit Judge of Wayne Co.*, 95 Mich. 100, 54 N. W. 632.

⁶⁰ *Mosher v. Banking House*, 6 Mo. App. 598.

"The statute requires written notice, and there is no other means by which a person can be lawfully summoned and required to answer as garnishee. The written notice is the original process by

⁶¹ See following page.

Naming and Misnaming the Parties.

§ 266. A misnomer, in the garnishment summons, of the plaintiff or the garnishee is no more fatal in this

which the garnishee is brought before the court, and the only authority which the officer or judgment creditor has for demanding his appearance and a disclosure of his financial and property relation to the judgment debtor. Hence, a judgment without service of written notice is a nullity. * * * The issuance and service of the scire facias did not cure that defect, or have any effect upon it; nor did the failure of the petitioner to defend the scire facias change the case already made." Illinois Cent. Ry. Co. v. Brooks, 90 Tenn. 161. 16 S. W. 77.

⁶¹ Acme Lumber Co. v. Francis Vandergrift Shoe Co., 70 Miss. 91, 11 South. 657.

AMOUNT OF THE PLAINTIFF'S CLAIM: Held, that the summons must state the amount of the demand against the defendant. Weaver v. Russell, 18 Ohio, 497.

SAME—STATUTORY FORM: The statute declared what should be stated in the writ of garnishment, and also, that "the following form of writ may be used," and proceeded to give a form setting forth the amount of the plaintiff's demand against the principal defendant, which the preceding section did not require to be stated in the writ. Held, that the form is permissive, not mandatory, and that a writ without that statement is good. Curtis v. Henrietta Nat. Bank, 78 Tex. 260, 14 S. W. 614. Being good without, it was not error for the court to refuse to allow the clause to be inserted by amendment. Curtis v. Ford, 78 Tex. 262, 14 S. W. 614.

THE CONTENTS OF THE AFFIDAVIT: It need not recite the contents of the affidavit, the statute not requiring it, nor state that the garnishee is a foreign corporation. Williams v. International Grain & Stock Board, 99 Mich. 80, 57 N. W. 1089.

ATTACHMENT CLAUSE: Where the statute provides for garnishment auxiliary under a writ of attachment, the failure of the clerk to insert the attachment clause in the alias writ for garnishment is an irregularity, but does not render the writ void. C. C. Kelly Banking Co. v. J. M. Robinson-Norton Co., 71 Miss. 141, 13 South. 932.

A statute required notice to be appended to garnishment summons, specifying the particular property attached. "All the debts, property," etc., of defendant in the garnishee's hands, held sufficient de-

than in any other writ, and may be in the same manner cured;⁶² but the writ must correctly state the name of the principal defendant, both his Christian and his middle name, as well as his surname, and, failing in this, the garnishee is totally unaffected by the service of the garnishment summons, and cannot be charged if he afterwards pays or delivers the debt or property to the principal defendant before he has actual knowledge of the identity of the principal defendant and the person named in the process.⁶³ Such a process is also

scription. *Carter v. Koshland*, 12 Or. 492, 8 Pac. 556. Compare *O'Brien v. Mechanics' & Traders' Fire Ins. Co.*, 56 N. Y. 52; *Neal v. Cook*, 10 N. J. Law, 337.

⁶² *Cain v. Rockwell*, 132 Mass. 193.

The failure of the clerk to name in the writ the garnishees to be summoned under a writ of attachment, issued on proper application, will not defeat proceedings against garnishees properly summoned and named in the application. *Semmes v. Patterson*, 65 Miss. 6, 3 South. 35.

The name of the garnishee may be inserted in the writ after the attachment of property, but before service on the principal defendant. *Chapman v. Mears*, 56 Vt. 389.

When a writ was served on a garnishee not named therein, and he afterwards appeared personally in court, and waived any defect in the writ or service, and his name was inserted, held, that he was properly discharged, on the motion of a subsequent attaching creditor. *Pratt v. Sanborn*, 63 N. H. 115; *Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. 721.

The insertion of the name of the plaintiff's attorney in the garnishment writ where the garnishee's name should be, and thus purporting to warn and summon such attorney to answer as garnishee, is not a fatal defect, for which the proceedings may be quashed. It appearing upon the face of the summons to be a clerical error, the court should allow the error to be amended. *Millard v. Lenawee* Circuit Judge (Mich.) 64 N. W. 1046.

⁶³ *Terry v. Sisson*, 125 Mass. 560; *German Nat. Bank of Denver v. National State Bank of Boulder* (Colo. App.) 39 Pac. 71.

"THE MIDDLE NAME, or the middle letter, is as much a part of

fatally defective as an attachment upon the debt or property in the hands of the garnishee, as against subsequent purchasers in good faith for value, before judgment against the garnishee, and who appear as intervening claimants, and claim the property as against the plaintiff; and the process cannot be subsequently amended so as to cut off the rights of third persons acquired in the meantime.⁶⁴

a man's name, in this part of the present century as either his Christian or his surname. The result is that the more modern authorities in the Eastern and commercial states have adjudged that the middle letter, or the middle name, is as essential to the accuracy of the writ as either the Christian or the surname. It would seem that when the question arises as to the rights to be secured by a process of attachment served on a third person whose position has changed prior to judgment, it may very properly be held that a mistake in the middle letter is such a legal misdescription as will avoid the process in favor of the one whose position is altered. * * * There was no showing in the present case that the bank had any knowledge whatever that their depositor was the one sought to be reached by the process at the time they paid out the money on his checks. Confining the decision to this particular class of cases, it is held that a garnishee is totally unaffected by any notice which may be served upon him, unless it properly runs with an accurate description against the individual to whom he may be indebted, unless it be in those cases where the proof may show that the garnishee had actual knowledge of the identity of the debtor and the person named in the process." *German Nat. Bank of Denver v. National State Bank*, 3 Colo. App. 17, 31 Pac. 122, and 39 Pac. 71.

The garnishee bank having deposits in the names James Shay and James Shea, the questions whether Shay and Shea are different names, and whether the garnishee knew or ought to have known that the writ served upon it naming one was intended to garnish the account of the other, are questions of fact, and the burden of proof to charge the garnishee is on the plaintiff. *White v. Springfield Inst. for Savings*, 134 Mass. 232.

⁶⁴ *Moore v. Graham*, 58 Mich. 25, 24 N. W. 670; *Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309. Compare *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 929; *McBride v. Protection Ins. Co.*, 22 Conn. 248, 257;

Errors and Irregularities—How Taken Advantage of and Cured.

§ 267. But, as to all persons who have not been misled to their injury by the misnomer of the defendant, the error may be corrected by amendment, at any time, *nunc pro tunc*.⁶⁵ Garnishment summons, being a process, cannot be demurred to.⁶⁶ The garnishee should file a plea in abatement of the writ, on the ground of the defects, or move to quash;⁶⁷ but, unless the writ is so defective that the court has acquired no jurisdiction, the error may be cured by amendment when the objection is made,⁶⁸ and the amendment will relate back to the date of service,⁶⁹ except as to rights

Hutchinson's Appeal, 92 Pa. St. 186. But see *Vermilyea v. Roberts*, 103 Mass. 410.

⁶⁵ *West v. Platt*, 116 Mass. 308; *Vermilyea v. Roberts*, 103 Mass. 410; *Wight v. Hale*, 56 Mass. 486, 48 Am. Dec. 677.

⁶⁶ *Curry v. Woodward*, 50 Ala. 258.

In this case persons severally liable were joined in one writ. Held, that a plea in abatement should not be sustained.

⁶⁷ *Curry v. Woodward*, 50 Ala. 258; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Stevens v. Dillman*, 86 Ill. 233; *Mansur v. Coffin*, 54 Me. 314; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

"The power of quashing writs is limited to proceedings that are irregular, defective, or improper. *Crawford v. Stewart*, 38 Pa. St. 34. If it appears on the face of the record that the proceedings are void, or grossly irregular, or where it is clearly shown that a valid cause of action in this form does not exist, the court may, on motion of the defendant, or of the garnishees in his behalf, quash the writ. No such case is presented here." *Steel v. Goodwin*, 113 Pa. St. 288, 6 Atl. 49.

⁶⁸ *Wellover v. Soule*, 30 Mich. 481; *Bushnell v. Allen*, 48 Wis. 460, 461, 4 N. W. 599; *Nash v. Brophy*, 13 Metc. (Mass.) 476; *West v. Platt*, 116 Mass. 308; *Vermilyea v. Roberts*, 103 Mass. 410.

A writ against one as an individual cannot be amended, on his disclosure of indebtedness as member of a firm, so as to hold the debt due from the firm. *Knapp v. Levanway*, 27 Vt. 298.

⁶⁹ *Sullivan v. Langley*, 128 Mass. 235; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630.

acquired in the meantime;⁷⁰ and the appearance of the garnishee, and answer without objection, will be deemed a waiver of them.⁷¹ But, of course, an absolutely void writ cannot be made good by amendment.⁷²

Service of Garnishment Summons.

Must be Made within Proper Time and Territory by Proper Officer.

§ 268. The other proceedings being valid, due service of summons upon the garnishee is the commencement of a suit in the name of the plaintiff against him,⁷³ and operates as an attachment, in his hands, of the property or debt alleged in the affidavit, and in respect of which he is summoned, placing it, substantially, in custodia legis.⁷⁴ The garnishment summons must be served by some person authorized by law, usually a constable or sheriff,⁷⁵ and must be served the

⁷⁰ Moore v. Graham, 58 Mich. 25, 24 N. W. 670.

⁷¹ Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44); Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581; Wellover v. Soule, 30 Mich. 481; Wile v. Cohn, 63 Fed. 759; Flournoy v. Rutledge, 73 Ga. 735; Phelps v. Reeder, 39 Ill. 172; National Bank of Commerce of Chicago v. Titsworth, 73 Ill. 591; Woodfolk v. Whitworth, 5 Cold. (Tenn.) 561; Moody v. Alter, 12 Heisk. (Tenn.) 142; Gould v. Meyer, 36 Ala. 565; Baltimore, O. & C. Ry. Co. v. Taylor, 81 Ind. 24.

⁷² Coda v. Thompson, 39 W. Va. 67, 19 S. E. 548.

⁷³ See ante, §§ 3, 179.

⁷⁴ See ante, §§ 192-194.

⁷⁵ WHO MAY SERVE PROCESS: Held, that a garnishment summons cannot be served by a person appointed as special constable for the purpose. Mangold v. Dooley, 89 Mo. 111, 1 S. W. 126. Following Fletcher v. Wear, 81 Mo. 524. Especially, if to minor. Vail v. Rowell, 53 Vt. 109.

Held, that special constable cannot make valid service, his appointment not being regular, for want of affidavit that no officer was

requisite number of days before the return day,⁷⁶ and within the territory over which the court from which it

at hand and the business was urgent. *Illinois Cent. Ry. Co. v. Brooks*, 90 Tenn. 161, 16 S. W. 77.

Without considering whether it is necessary or not, under this law, that the precept should be served by some officer commissioned to serve process, or by some person regularly deputed to make the particular service, it is certainly true that it is far better and safer. *Johnson v. Delbridge*, 35 Mich. 436.

Held, that the writ must be served by an officer to whom it is directed, and not by one to whom it might have been directed, and who is otherwise qualified to make it. *Menderson v. Specker*, 79 Ky. 509. *Contra*, *Foster v. Wiley*, 27 Mich. 244, 248, 15 Am. Rep. 185.

Service by deputy sheriff, when another deputy is plaintiff, is void, the statute providing that in such cases service shall be made by the coroner. *Thayer v. Ray*, 17 Pick. (Mass.) 166. Held, that the defect is waived by garnishee answering. *Reynolds v. Collins*, 78 Ala. 94.

Justice of the peace cannot serve summons. *Massengale v. McGinty*, 73 Ga. 120.

Sheriff receiving garnishment summons to serve sent a certified copy of it to the sheriff of another county, who served it there, without having the original. Held, that sheriff was without authority, and the service was invalid. *Carroll Co. Bank v. Goodall*, 41 N. H. 81.

Only the officer holding a writ of attachment has power to summon garnishees thereunder. Service of summons by an officer without the attachment writ is void. *Van Fossen v. Anderson*, 8 Iowa, 251; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Wales v. Clark*, 43 Conn. 183. Compare *Pratt v. Sanborn*, 63 N. H. 115.

NEGLIGENCE OF OFFICER: Concerning liability of officer for failure to serve writ, see *Smith v. Yale*, 50 Conn. 526; *Howe v. White*, 49 Cal. 658.

⁷⁶ *Southern Bank v. McDonald*, 46 Mo. 31; *Paul v. Bird*, 25 N. J. Law, 559; *Alexander v. Equitable Fire Ins. Co.* (Miss.) 12 South. 706; *Alexander v. Lloyd*, 70 Miss. 662, 14 South. 22. *Contra*, *McKenzie v. Ransom*, 22 Vt. 324.

It may be served before the summons in the principal suit is served. *Phillips v. Germon*, 43 Iowa, 101.

"IN DETERMINING THE TIME within which process or notice

issues has jurisdiction, or express statutory authority to send this writ for service,⁷⁷ or the service will be absolutely void.

Must Otherwise Comply with Statute.

§ 269. It is also essential to the validity of the service that it be made in the manner prescribed by the statute under which it issues, usually by reading or showing the original to the garnishee, and giving him a marked or certified copy, together with the statutory fee for his answer.⁷⁸ When no other mode of service

must be served, the language of the statute must be observed; and where an act is to be done a certain number of days before a day stated, then that day is excluded in the computation; but where an act is to be done a certain number of days before another act, then the day on which that act is to be done is included." *Chaddock v. Barry*, 9: Mich. 542, 53 N. W. 785, following *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422. See, also, *Smith v. Force*, 31 Minn. 119, 16 N. W. 704; *White v. German Ins. Co.*, 15 Neb. 660, 20 N. W. 30; *Foster v. Markland*, 37 Kan. 32, 14 Pac. 452.

⁷⁷ *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Toledo, W. & W. Ry. Co. v. Reynolds*, 72 Ill. 487; *Gage v. Maschmeyer*, 72 Iowa, 696, 34 N. W. 482. Compare *Pike v. Lytle*, 6 Ark. 212.

"It is true a justice of the peace cannot send process beyond the territorial jurisdiction of such a court, as defined by statute. The judgment in this case was obtained in the circuit court, and no reason is perceived why it could not send process of this character to any county in the state. * * * Any other construction would defeat the intention of the legislature." *Toledo, W. & W. Ry. Co. v. Reynolds*, 72 Ill. 487.

Garnishment summons from justice court cannot be sent out of the county for service, except under How. Ann. St. Mich. § 8035. *Hebel v. Amazon Ins. Co.*, supra.

⁷⁸ *Kneeland v. Cowles*, 4 Chand. (Wis.) 46, 3 Pin. (Wis.) 316; *West v. Harvey*, 81 Ga. 711, 8 S. E. 449; *Insurance Co. of North America v. Friedman*, 74 Tex. 56, 11 S. W. 1046; *McGuire v. Church*, 49 Conn. 248; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Railroad Co. v. Todd*,

is provided, service as in a personal action is sufficient.⁷⁹

Garnishee may Waive Irregularities.

§ 270. The garnishee may make many admissions and waivers without endangering his protection. He may waive payment of the fee allowed him by law, and his appearance and answer without objection will cure all defects in the process which do not go to the jurisdiction of the subject-matter.⁸⁰

11 Heisk. (Tenn.) 549; Desha v. Baker, 3 Ark. 509; Hite v. Fisher, 76 Ind. 231.

ACTUAL KNOWLEDGE by the garnishee that a writ has been issued against him will not aid the lack of due service. Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Held, that the original summons should be delivered to the garnishee. West v. Harvey, 81 Ga. 711, 8 S. E. 449.

PAYMENT OF FEES TO THE GARNISHEE: The garnishee is not compelled to obey a summons unless his fees for mileage and one day's attendance, as provided for by statute, are tendered or paid in advance. McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539.

But failure to pay the garnishee the statutory fee at the time of service does not render the service void, though the garnishee demand his fee then. The failure to pay the fees, if demanded at the time of service, excuses the garnishee from default for not answering; but, after such service, he pays or delivers, at his peril, any money or property belonging to the defendant, as his fees may be afterwards tendered him, and he then required to answer on the original service. Westphal v. Clark, 42 Iowa, 371.

If the garnishee appears without demanding his fees in advance, he thereby waives his right to demand them before answering; and if, when called upon to answer, he refuses to do so until his fees are paid, a judgment by default may properly be rendered against him. Stockberger v. Lindsey, 65 Iowa, 471, 21 N. W. 782.

⁷⁹ Purves v. Lex (Pa. Sup.) 9 Atl. 167. See, also, post, § 273.

⁸⁰ Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44); Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581; Garland v. Mc-

Garnishee cannot Waive Jurisdictional Defects.

§ 271. Such waivers by the garnishee cure all defects in the service or process as a personal summons, but not as an attachment upon the property. Appearance and submission under void service depend upon a personal right to waive service, which the garnishee, as such, does not possess. He can waive his own rights, but cannot waive the defendant's rights. He cannot voluntarily appear and substitute his creditor's creditor for his own, because that goes to jurisdiction of the subject-matter, not to jurisdiction of the person.⁸¹ Fatal defects in the service or process cannot be cured by any act of the garnishee. Although the

Kittrick, 52 Wis. 261, 9 N. W. 160; Wickham v. South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287; Axman v. Dueker, 45 Kan. 745, 26 Pac. 946; Lupton v. Moore, 101 Pa. St. 318; Bushnell v. Allen, 48 Wis. 460, 4 N. W. 599; Houston v. Walcott, 1 Iowa, 86; Carrington v. Eastman, 1 Pin. (Wis.) 650; Miller v. O'Bannon, 4 Lea (Tenn.) 498; Howard v. Crawford, 21 Tex. 399; Truitt v. Griffin, 61 Ill. 26; Reynolds v. Collins, 78 Ala. 94; Northern Cent. Ry. Co. v. Rider, 45 Md. 24; McKenzie v. Ransom, 22 Vt. 324; Pulliam v. Aler, 15 Grat. (Va.) 54; Dittenhoefer v. Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 600.

The following and a part of the foregoing decisions seem to go the length of holding that the garnishee may waive service entirely; but they go upon a mistaken view of his position, and overlook the defendant's right. Whitney v. Lehmer, 26 Ind. 503; Carter v. Koshland, 12 Or. 492, 8 Pac. 556; Marquee v. Le Blanc, 29 La. Ann. 194; Phipps v. Snodgrass, 31 La. Ann. 88; Gomila v. Milliken, 41 La. Ann. 116, 5 South. 548; Cahoon v. Morgan, 38 Vt. 234; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 891; Phillips v. Thurber, 56 Ga. 393; Burt v. Parish, 9 Ala. 211.

⁸¹ Steen v. Norton, 45 Wis. 412, 417; Edler v. Hasche, 67 Wis. 653, 31 N. W. 57; McCormick Harvesting Mach. Co. v. James, 84 Wis. 600, 54 N. W. 1088; Hebel v. Amazon Ins. Co., 33 Mich. 400; Raymond v. Rockland Co., 40 Conn. 401; Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863; Insurance Co. of North America v. Fried-

garnishee indorse on the back of the garnishment summons, and sign, an admission of service, yet any person interested may object that there has been no valid service, and thereupon the garnishee will be discharged.⁸²

Service of Garnishment Summons upon Natural Persons.

§ 272. The statutes usually require that the summons in garnishment shall be served personally upon the garnishee; and in this, as in other respects, the statute must be complied with.⁸³ If the summons is against several as joint garnishees, each should be

man, 74 Tex. 56, 11 S. W. 1046; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 827; *Epstein v. Salorgne*, 6 Mo. App. 352; *Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. 721; *State v. Duncan*, 37 Neb. 631, 56 N. W. 214; *Gage v. Maschmeyer*, 72 Iowa, 696, 34 N. W. 482; *Schindler v. Smith*, 18 La. Ann. 476; *Northern Cent. Ry. Co. v. Rider*, 45 Md. 24; *Wile v. Cohn*, 63 Fed. 759.

"The nature of the proceeding requires that the law shall be brought to bear directly against the right of the principal defendant in the hands or under the control of the garnishee; and the mode, and the only one, provided for this is by service of the process on, or submission to service by, some one competent in law to receive service. The law itself must be caused to attach, and it can be effected in no other way. Independent and spontaneous submission by the custodian or debtor of the right belonging to the principal defendant cannot bind him. The intervention of the law, according to its own substantial appointments, can alone initiate compulsory novation." *Hebel v. Amazon Ins. Co.*, *supra*.

"Whatever a garnishee may do respecting his own rights, he is powerless to do anything which will affect the rights of third persons; and if he is not legally served, nothing is attached in his hands." *Gates v. Tusten*, *supra*.

⁸² *Id.*

⁸³ *Ex parte Alston*, 2 Brev. (S. C.) 87; *Richardson v. Whitfield*, 1 McCord (S. C.) 403; *Carter v. Koshland*, 12 Or. 492, 8 Pac. 556.

But the statutes of some of the states allow service by leaving a copy of the summons at the garnishee's usual place of residence, or

served with process.⁸⁴ But if only a part of the joint garnishees reside within the state or can be there found, service on those residing within the state is sufficient to confer jurisdiction of the debt or property garnished, and authorize the court in passing judgment against the garnishee in respect thereof.⁸⁵ And service of summons upon one member of the copartnership to which it is directed is sufficient in any case, unless the garnishee, in season, make the objection of want of due service.⁸⁶

at his place of business. *Conley v. Chilcote*, 25 Ohio St. 320; *Whitman v. Keith*, 18 Ohio St. 134; *Schindler v. Smith*, 18 La. Ann. 476.

⁸⁴ *Warner v. Perkins*, 8 Cush. 518.

⁸⁵ *Parker v. Danforth*, 16 Mass. 299; *Peck v. Barnum*, 24 Vt. 75; *Flagg v. Platt*, 32 Conn. 216.

But one member of nonresident partnership held unable to accept service within the state, so as to bind the firm. *Clark v. Wilson*, 15 N. H. 150.

⁸⁶ *Hoyt v. Robinson*, 10 Gray, 371; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55 (Gil. 44); *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599; *Bean v. Barney*, 10 Iowa, 498; *Speak v. Kinsey*, 17 Tex. 301. Compare *Gerry v. Gerry*, 10 Allen, 160. But see *Proctor v. Lewis*, 50 Mich. 329, 15 N. W. 495; *Lyon v. Ballentine*, 63 Mich. 97, 29 N. W. 837.

When only one of two garnishees is served, held, that neither he, the defendant, nor a claimant can object to the want of service on the other. *Shelters v. Bourdeau* (N. H.) 32 Atl. 151.

Service of summons upon a copartnership, by leaving copy of the summons at the usual place of business of the firm, with the person in charge, held sufficient service upon the firm, although garnishee duly objected to want of due service. *Whitman v. Keith*, 18 Ohio St. 134, 146.

Held, that service upon one member of a firm attached the debt, and rendered the garnishee liable to the plaintiff, although the other member of the firm paid the debt to the defendant before knowing of the garnishment. *State v. Linaweaver*, 3 Head (Tenn.) 51.

If service on one partner alone is ever sufficient to authorize rendering judgment against both for the joint debt, it cannot be done.

Service of Garnishment Summons upon Corporations.

§ 273. Service of garnishment summons, under statutes not providing any special mode of service upon corporations, may be made in the manner provided by law for service of summons upon such corporations in ordinary actions.⁸⁷ But, if the statute under which the proceedings are conducted provides the manner in which such summons shall be served, it must be served

unless the return of the officer shows that he was unable to find the other. *Proctor v. Lewis*, 50 Mich. 329, 15 N. W. 495.

⁸⁷ *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400, 405; *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655, *Mobile & O. Ry. Co. v. Barnhill*, 91 Tenn. 395, 19 S. W. 21. Compare *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55 (Gil. 44); *Pennsylvania Ry. Co. v. Peoples*, 31 Ohio St. 537; *Clafin v. Iowa City*, 12 Iowa, 284; *Kennedy v. Hibernia Savings & Loan Soc.*, 38 Cal. 151.

But garnishment summons cannot be served on a foreign corporation doing business in the state, by serving the same upon an attorney appointed, as required by law, to receive service of process in "actions upon any liability or indebtedness incurred or contracted while such company, etc., transacted business in this state," because the garnishment suit is not commenced upon any liability contemplated by the statute. *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 90, 20 N. W. 801; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400, 405; *Upton Manuf'g Co. v. Stewart*, 61 Iowa, 209, 16 N. W. 84. Compare *Milwaukee Bridge & Iron Works v. Wayne Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *German-American Ins. Co. v. Chippewa Circuit Judge* (Mich.) 63 N. W. 531. Contra, *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538.

A Georgia statute allowed service of process in ordinary cases to be made upon an officer or agent of the corporation. The garnishment statute required summons to be personally served. Held, that garnishment summons should be served upon the president of the corporation, and not upon any subordinate officer, even though the president be temporarily absent from the state, the reason assigned being that garnishment acts as an immediate attachment, and

in that manner and upon some person therein designated as competent to receive service.⁸⁸ The mode of service upon foreign corporations is absolutely in the

should be made on the one controlling the affairs of the company, to protect them from loss. *Clark v. Chapman*, 45 Ga. 486; *Steiner v. Central Ry. Co.*, 60 Ga. 552; *Bingham v. Port Royal & A. Ry. Co.*, 74 Ga. 365.

Held, that an insurance company may be served as garnishee, by service upon the attorney required by law to be appointed by the company to receive service of process upon the company in actions against it; but he must be personally served, and service on the clerk in his office is not sufficient. *Dittenhoefer v. Cœur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660.

A California statute allowed service of process in ordinary actions to be made upon "the president or other head of the corporation, secretary, cashier, or managing agent thereof." Service of garnishment upon the teller of a bank held sufficient. *Kennedy v. Hibernia Savings & Loan Soc.*, 38 Cal. 151. Compare *Lambreth v. Clarke*, 10 Heisk. (Tenn.) 32.

Held, that the cashier of a bank is a proper person on whom to serve a garnishment against the bank. *Rosenberg v. First Nat. Bank of Texarkana* (Tex. Civ. App.) 27 S. W. 897.

SERVICE ON RECEIVER: In the absence of specific statute, when the property and business of a corporation is in the hands of a receiver, he is the proper person on whom to serve process to bring in the corporation as garnishee. *Ganebin v. Phelan*, 5 Colo. 83; *Irvine v. Dean*, 93 Tenn. 346, 27 S. W. 666.

⁸⁸ *First Nat. Bank of Detroit v. Burch*, 76 Mich. 608, 43 N. W. 453; *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447, 59 N. W. 809; *Tompkins Machine & Implement Co. v. Schmidt* (Tex. App.) 16 S. W. 174.

Exceptional modes of service must be confined to the cases, and exercised in the way, precisely indicated by the statute. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

GENERAL OR SPECIAL AGENT: In garnishment proceedings, under a statute which allowed the garnishment summons to be served upon the president, cashier, secretary, treasurer, general or special agent, superintendent, or other principal officer of such corporation, held, that "the terms 'general or special agent' are very indefinite, but, employed as they are here, in association with terms

discretion of the legislature. They have no existence outside of the state of their creation, except by comity; and, if they wish to do business in other states, such states may impose any conditions they may wish, reasonable or unreasonable, and this is not denying any

designating the principal officers of the corporation, they evidently intend agents who, either generally, or in respect to some particular department of the corporate business, have a controlling authority, either general or special. They do not mean every man who is intrusted with a commission or an employment." *Kirby Carpenter Co. v. Trombley*, 101 Mich. 417, 59 N. W. 809; *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 489. Compare *Waco Lodge No. 70 v. Wheeler*, 59 Tex. 554. A bookkeeper is not competent to receive service under this statute. *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900.

STATION AGENT: The statute, allowing service to be made upon the "nearest station or freight agent," is not complied with by proof of service upon "the nearest agent." *Haley v. Hannibal & St. J. Ry. Co.*, 80 Mo. 112; *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. 126.

A MANAGING OFFICER: Service on an agent doing business in the state for a foreign corporation is service upon a "managing officer" of such corporation. *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214; *Mosher v. Banking House*, 6 Mo. App. 598. Compare *Holland v. Mobile & O. Ry. Co.*, 16 Lea (Tenn.) 414; *Hargis v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 42, 15 S. E. 630.

ABSENCE OF PROPER OFFICERS: It is the duty of a domestic corporation to keep an officer within the state upon whom process against it may be served. It will not be presumed that the corporation intended to put itself outside the jurisdiction of the state. Therefore, if all the principal officers reside out of the state, it will be presumed that the corporation intended that the officer living within the state, and having charge of its affairs there, in the absence of the principal officers, should be considered as its managing agent or officer, for the purpose of receiving service of process against it. *Wickham v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287.

A Connecticut statute provided that, when the secretary does not reside in the town where the business of the corporation is trans-

person within its jurisdiction the equal protection of its laws.⁸⁹

Laws for Substituted Service Constitutional.

§ 274. The statutes of most of the states provide a proceeding by garnishment to collect demands due from persons living without, having no attachable property, and who cannot be found within, the jurisdiction.⁹⁰ Some of these statutes provide for publication of notice to the principal defendant, some of them

acted, the summons in garnishment may be served on the clerk or bookkeeper in charge. Held that, the secretary being continually absent on business, service on the agent in charge is sufficient, though the home of the secretary is there. *Adams v. Willimatic Linen Co.*, 46 Conn. 320. It is not sufficient to serve process on the president, treasurer, or financial manager under this statute, if the corporation has a secretary where service may be made on him. *Raymond v. Rockland Co.*, 40 Conn. 401. Compare *Northern Cent. Ry. Co. v. Rider*, 45 Md. 24.

Service upon a bank as garnishee by service on a bookkeeper during business hours, he being the only person found in the banking house, is good service, under a statute allowing service upon the "president, or other head of the same, or the secretary, cashier, or managing agent thereof." *First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. 290. Compare *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

REQUESTED SERVICE: The president of a corporation directed the officer having the process to deliver the same to a clerk. Held good service on the president. *Davidson v. Donovan*, 4 Cranch, C. C. 578, Fed. Cas. No. 3,603.

⁸⁹ *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, 50 N. W. 389; *First Nat. Bank of Detroit v. Burch*, 80 Mich. 242, 45 N. W. 93; *National Bank of Commerce v. Huntington*, 129 Mass. 444.

⁹⁰ 2 How. Ann. St. Mich. §§ 6855, 8087; 3 How. Ann. St. Mich. § 6841; Gen. St. Minn. c. 66, §§ 150, 151; Sanb. & B. Ann. St. § 2753; *Frisk v. Reigelman*, 75 Wis. 499, 506, 43 N. W. 1117; *Fuller v. Foote*, 56 Conn. 341, 15 Atl. 760; *Jepson v. International Fraternal Alliance*, 17 R. I. 471, 23 Atl. 15; *Morse v. Nash*, 30 Vt. 76.

provide that notice to the garnishee shall be such notice, and others provide that notice of the proceedings shall be served personally upon the principal defendant wherever he may be found, without the jurisdiction. The validity of such legislation to confer jurisdiction upon the court to condemn the debt or property in the hands of the garnishee to payment of the plaintiff's demand, without jurisdictional service of process upon the principal defendant, is well established, and rests upon the ground that every state possesses exclusive sovereignty over all persons and property within its territorial limits.⁹¹

Such Statutes must be Strictly Pursued.

§ 275. But, the remedy being extraordinary, and so liable to abuse and injustice, unless properly regulated, the courts enforce a rigorous compliance with all the provisions of the statute; and a failure in any will be fatal to the proceedings, and deprive the court of jurisdiction if previously acquired. All rights acquired under the proceedings depend upon compliance with the requirements of the statute.⁹²

⁹¹ See ante, § 233; *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Newland v. Circuit Judge of Wayne Co.*, 85 Mich. 151, 48 N. W. 544; *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

⁹² *Lackett v. Rumbaugh*, 45 Fed. 23, 30.

The officer to whom summons is given for service upon the principal defendant must make an honest effort, during every day allowed him by law for service, to serve the same on him, before he can make return that the principal defendant has no place of residence within the county, and cannot be found therein, and thereupon make service upon the garnishee as allowed in such cases. *Kraft v. Rath*, 45 Mich. 20, 7 N. W. 232; *Withington v. Southworth*, 26 Mich. 381; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121;

Such Service not Foundation for Personal Judgment.

§ 276. If no property is seized by actual levy, and no personal service is had on the defendants, and the

Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510. But see Winner v. Hoyt, 68 Wis. 278, 290, 32 N. W. 128. Compare Decatur, C. & N. O. Ry. Co. v. Crass, 97 Ala. 519, 12 South. 43.

The summons from justice court, if the defendant has a last place of residence within the county, should be served by leaving a copy there with some member of the family; but, service being regular, the justice is ousted of jurisdiction by making an unauthorized adjournment. Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982.

Service by leaving a copy of the summons at the last place of residence is void, if left with a person not a member of the family. Laidlaw v. Morrow, 44 Mich. 547, 7 N. W. 191.

Failure to serve the prescribed notice upon all the nonresident defendants within the time limited by the statute is fatal to the proceedings. Hamilton v. Rogers, 67 Mich. 135, 34 N. W. 278; Landsberg v. Bullock, 79 Mich. 278, 44 N. W. 608.

Although not expressly required by the statute, some form of service must be had upon the principal defendant within the county where the suit is conducted; and, as the only service within the jurisdiction is on the garnishee, he must be served within the county. McCloskey v. Judge of Wayne Circuit, 26 Mich. 100; Moore v. Wayne Circuit Judge, 55 Mich. 84, 20 N. W. 801.

Publication of notice to the defendant must be in compliance with the statute. Frisk v. Reigelman, 75 Wis. 499, 502, 43 N. W. 1117; Dorr's Adm'r v. Rohr, 82 Va. 359.

The copy left at the defendant's last place of residence not being duly attested, as required by law, the service is void. McGuire v. Church, 49 Conn. 248.

Held, that garnishee can waive defects, so as to support the garnishment. McKenzie v. Ransom, 22 Vt. 324.

A judgment passed against the defendant on the return day of the process, without adjournment of at least three months, as required by statute, when defendant is not personally served, is manifestly erroneous. Potter v. Sanborn, 49 Conn. 452.

"Not in the state" means nonresidents as well as absent residents. *Id.*

garnishees summoned are not indebted to them, and hold no property belonging to them, the proceedings are necessarily at an end; but the plaintiff may, if he can, disprove the garnishee's denial of liability, and thus sustain the jurisdiction.⁹³ In the federal courts garnishment can be employed only when the principal defendant is personally served within the district with process in the main action.⁹⁴

The Officer's Return.

The Only Proper Evidence of Service.

§ 277. All that has been said of the service of the writ applies with equal force to the return, for the return is the officer's report of his doings under the writ. It should be indorsed upon the writ, or made upon a paper annexed thereto; for the writ and return constitute, essentially, one record, and must go together.⁹⁵ Whatever the statute requires to be done in the service of the writ, the return must show to have been done;⁹⁶ and, unless it shows that due service has been

⁹³ McGillin v. Claffin, 52 Fed. 657.

⁹⁴ Anderson v. Shaffer, 10 Fed. 266; Central Trust Co. v. Chattanooga R. & C. R. Co., 68 Fed. 685; Richmond v. Dreyfous, 1 Sumn. 131, Fed. Cas. No. 11,799.

⁹⁵ Rock v. Singmaster, 62 Iowa, 511, 17 N. W. 744.

But failure to indorse the return upon the proper summons is held not to be jurisdictional. Bushnell v. Allen, 48 Wis. 460, 4 N. W. 499.

⁹⁶ Dasha v. Baker, 3 Ark. 509; Batchellor v. Richardson, 17 Or. 334, 21 Pac. 392; Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3; Steiners v. Central Ry. Co., 60 Ga. 552; Insurance Co. of North America v. Friedman, 74 Tex. 56, 11 S. W. 1046; James v. Jenkins, Hempst. 189, Fed. Cas. No. 7,181a; Acme Lumber Co. v. Frances Vandergrift Shoe Co., 70 Miss. 91, 11 South. 657; Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863; Maulsby v. Farr, 3 Mo. 439.

When the statute authorized the sheriff to summon garnishees only

made, the court has before it no proper evidence upon which to base any further proceedings.⁹⁷ Its absence cannot be cured by the garnishee's signed admission of due service.⁹⁸

Should State Acts Done, Time, and Persons Served.

§ 278. The return should state the facts, and a return of "Executed" is no evidence of sufficient service.⁹⁹ It should show the time when service was made,¹⁰⁰ and upon whom made; and, if the service is

in case he could find no property on which to levy, the return should show that he had been unable to find property, and, failing to do so, no doubt, the garnishee might, on motion, have it quashed, if the sheriff should not amend on leave granted; but, failing to make the motion, he must be considered as waiving the objection. *Truitt v. Griffin*, 61 Ill. 26.

⁹⁷ *Rock v. Singmaster*, 62 Iowa, 511, 17 N. W. 744; *Johnson v. Delbridge*, 35 Mich. 436; *McDonald v. Moore*, 65 Iowa, 171, 21 N. W. 504; *Haley v. Hannibal & St. Joseph Ry. Co.*, 80 Mo. 112. Compare *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

But held that, there having been a valid service in fact made, the court thereby acquired jurisdiction, although the return was not made till after judgment was rendered. *Kneeland v. Cowles*, 4 Chand. (Wis.) 46.

⁹⁸ *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Johnson v. Delbridge*, 35 Mich. 436, 438; *Schindler v. Smith*, 18 La. Ann. 476.

⁹⁹ *Roy v. Heard*, 38 Miss. 544. Compare *Pomeroy v. Rand, McNally & Co.* (Ill.) 41 N. E. 636.

But, if the statute prescribes what shall be the form of the return, that form would, of course, be sufficient, though not stating the facts. However, if the officer does not choose to follow the statutory form, he must state all necessary facts; and no presumptions can be made in favor of due service. *Semmes v. Patterson*, 65 Miss. 6, 3 South. 35.

A return substantially in the words of the statute prescribing the manner of service will usually be sufficient. *Healey v. Butler*, 66 Wis. 9, 27 N. W. 822.

¹⁰⁰ *Lambert v. Challis*, 35 Pa. St. 156, note; *Sun Mut. Ins. Co. v.*

vicarious, it must show the relation of the person served to the garnishee, for the relation is as important as the fact of the service itself.¹⁰¹

Defects in—How Cured.

§ 279. Palpable defects in the return are not cured by the presumption that the officer has done his duty.¹⁰² But it is held that objections to the sufficiency of the return must be made before or at the time

Seeligson, 59 Tex. 3; Cariker v. Anderson, 27 Ill. 358; Mosher v. Banking House, 6 Mo. App. 598.

The date indorsed must be taken as the date of the service, as the officer need not date his return. The clerk makes that entry, or should. Cariker v. Anderson, 27 Ill. 358.

¹⁰¹ Kirby Carpenter Co. v. Trombley, 101 Mich. 447, 59 N. W. 809; Hebel v. Amazon Ins. Co., 33 Mich. 400; Lake Shore & M. S. Ry. Co. v. Hunt, 39 Mich. 471; Haley v. Hannibal & St. J. Ry. Co., 80 Mo. 112; Montgomery & E. Ry. Co. v. Hartwell, 43 Ala. 508; Hargis v. East Tennessee, V. & G. Ry. Co., 90 Ga. 42, 15 S. E. 631; Mayer v. Chattahoochee Nat. Bank, 46 Ga. 606; Tompkins Mach. & Imp. Co. v. Schmidt (Tex. App.) 16 S. W. 174.

Return of service upon a corporation should be served on — (the corporation), by delivering, etc., to — (the person served, with the name of his relation to the corporation, etc.,) at, etc. Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55 (Gil. 44).

¹⁰² Laidlaw v. Morrow, 44 Mich. 547, 7 N. W. 191; Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982; Garland v. Sperling (N. M.) 30 Pac. 925; Gates v. Tusten, 89 Mo. 13, 14 S. W. 827; Semmes v. Patterson, 65 Miss. 6, 3 South. 35.

But "served by leaving at the dwelling house" is sufficient service at "the last place of abode" of the garnishee. Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

A return is not defective because showing double service, or service on two different days. Anderson v. Graff, 41 Md. 601.

The officer is presumed to have served the summons according to law. Lowrey v. Clements, 9 Ala. 422; Burt v. Parish, Id. 211.

"The courts are not critical as to the language used by the officer in making his return, and it is sufficient if it can be fairly inferred therefrom that he has met the requirements of the law, and to this

of answering the writ.¹⁰³ The return is conclusive of the proceedings under the writ.¹⁰⁴ The officer cannot afterwards amend it of his own motion, but the court will always allow an amendment to be made, so as to make the return accord with the facts, if the application therefor is made in season, and upon sufficient showing of the facts;¹⁰⁵ and, if the officer fail to make a return, the court may direct him to do so.¹⁰⁶

end it should receive every reasonable intendment and presumption." *Sabin v. Michell* (Or.) 39 Pac. 635.

Returns held sufficient in the following cases: *McCoy v. Boyle*, 10 Md. 391; *Lindell v. Benton*, 6 Mo. 361.

¹⁰³ *Kohler v. Thorn*, 154 Pa. St. 180, 26 Atl. 255.

A valid return being indorsed on the writ when returnable, the garnishee may, although he has answered, question a return afterwards indorsed showing a prior service. *Vail v. Rowell*, 53 Vt. 109.

¹⁰⁴ *Castner v. Styer*, 23 N. J. Law, 236; *Brecht v. Corby*, 7 Mo. App. 300; *Sadler v. Trustees of Prairie Lodge*, 59 Miss. 572.

That only is the return of the officer which is indorsed and signed when he returns it into court. *Brecht v. Corby*, above.

Held, that the garnishee may dispute and disprove the statements of the return. *Chanute v. Martin*, 25 Ill. 49.

¹⁰⁵ *Main v. Lynch*, 54 Md. 658; *Bushnell v. Allen*, 48 Wis. 461, 4 N. W. 599; *Ware v. Bucksport & B. Ry. Co.*, 69 Me. 97; *Mayer v. Chattahoochee Nat. Bank*, 46 Ga. 606; *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. 126; *Brecht v. Corby*, 7 Mo. App. 300.

Appearance and answer held to waive slight defects in the return. *Truitt v. Griffin*, 61 Ill. 26; *Pulliam v. Aler*, 15 Grat. (Va.) 54.

But a return "Not found," prematurely made cannot be made valid by amendment, so as to show return after proper search. *Kraft v. Raths*, 45 Mich. 20, 7 N. W. 232. Compare *Carroll Co. Bank v. Goodall*, 41 N. H. 81.

¹⁰⁶ *Rock v. Singmaster*, 62 Iowa, 511, 17 N. W. 744.

Notice of the Garnishment to the Principal Defendant.

No Notice Need be Served on Defendant.

§ 280. If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court.¹⁰⁷ But, in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted.¹⁰⁸

¹⁰⁷ See ante, §§ 232, 233, 274, 275.

¹⁰⁸ *Winner v. Hoyt*, 68 Wis. 278, 289, 32 N. W. 128; *Kesler v. St. Johns*, 22 Iowa, 565; *Phillips v. Gernon*, 43 Iowa, 101; *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139; *Reed v. Fletcher*, 24 Neb. 435, 39 N. W. 437; *Jarvis v. Mitchell*, 99 Mass. 530; *Chanute v. Martin*, 25 Ill. 49.

But the court entertaining the proceedings has undoubted authority, in any case, to require that such notice be given; and as a guard against fraud it is eminently proper. *Union Pac. Ry. Co. v. Smersh*, above.

Held, that a law providing for garnishment without notice to the judgment debtor is unconstitutional. *Bryant v. Bank of California* (Cal.) 8 Pac. 644.

Notice Required by Statute is to Secure Good Faith.

§ 281. When the statutes require such notice to be served upon the principal defendant, it is to secure good faith, and prevent secret or collusive proceedings, and has been said to be in the nature of a notice in a proceeding in rem, served upon the owner after the court has acquired jurisdiction of the res.¹⁰⁹

Whether Jurisdictional.

§ 282. Certainly, the defendant has a right to insist upon the benefit of this provision; but, in giving it a construction, it is important to determine whether such service on the defendant is jurisdictional, and hence a condition precedent, or a mere notice after jurisdiction has been obtained, and hence a condition subsequent. On the one hand, it is said that it is not required to secure any new and independent jurisdiction over such defendant personally, or the property and credits sought to be reached thereby, for the service upon the garnishee gives jurisdiction of the res, and jurisdiction of the principal defendant personally was secured by service of summons upon him in the original suit.¹¹⁰ In this view of the question, this notice is not process, nor does it bring any party into court.¹¹¹ But, on the other hand, it is said that, under

¹⁰⁹ Winner v. Hoyt, 68 Wis. 278, 32 N. W. 128.

The object of the statute is to give the judgment defendant an opportunity to intervene in the proceedings and protect any right he may have. Williams v. Williams, 61 Iowa, 612, 16 N. W. 718.

This being its purpose, he clearly waives it by appearing without it. Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa, 364, 55 N. W. 496.

¹¹⁰ Winner v. Hoyt, 68 Wis. 278, 32 N. W. 128. Compare Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Aultman, Miller & Co. v. Markley (Minn.) 63 N. W. 1078.

¹¹¹ Compare Trunkey v. Crosby, 33 Minn. 464, 23 N. W. 846.

such statutes, the principal defendant is a necessary party to the garnishment suit,¹¹² and therefore this notice is essential to jurisdiction of the court over the subject-matter in controversy, which is the debt owing or property held by the garnishee.¹¹³

Time, Manner, Sufficiency, and Waiver of Service of This Notice.

§ 283. However this may be, it is certain that, being required by the statute, the notice must be given in the time and manner prescribed, or the judgment will be erroneous, and may be set aside in a direct proceeding for that purpose.¹¹⁴ Being required for the defendant's benefit, his appearance without notice is a waiver of it.¹¹⁵ What is a sufficient service when the statute does not prescribe the particular manner in which this notice shall be served? Certainly, any service which would be a valid service as commencement of an ordinary action would be sufficient.¹¹⁶

¹¹² *Wise v. Rothschild*, 67 Iowa, 84, 24 N. W. 603.

¹¹³ *Williams v. Williams*, 61 Iowa, 612, 16 N. W. 718.

A subsequent garnishing creditor may move to dismiss for want of a proper notice. *Globe Milling Co. v. Boynton*, 87 Wis. 619, 59 N. W. 132.

¹¹⁴ *Williams v. Williams*, 61 Iowa, 612, 16 N. W. 718; *Wise v. Rothschild*, 67 Iowa, 84, 24 N. W. 603.

Held, that notice served before issue made is good. The only requirement is that it be served the requisite time before the trial. *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933.

¹¹⁵ *Everdell v. Sheboygan & Fond du Lac Ry. Co.*, 41 Wis. 395, 402; *Winner v. Hoyt*, 68 Wis. 278, 290, 32 N. W. 128; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364, 55 N. W. 496.

¹¹⁶ *Hinkley v. St. Anthony Falls Water-Power Co.*, 9 Minn. 55 (Gil. 44).

Held, that service by publication is sufficient. *Broome v. Galena, D., D. & M. Packet Co.*, 9 Minn. 239 (Gil. 225).

The notice of the garnishment proceedings which the statute requires to be served on the principal defendant need not be served in

But, considered as a notice, and not a process, service upon one of several defendant copartners is notice to all,¹¹⁷ and notice to the attorney who appeared for the defendant in the principal suit is notice to the defendant.¹¹⁸ It must be a notice of the garnishment proceedings, and the summons to him in the main action is not such a notice.¹¹⁹

Proceedings to Vacate Garnishment of Errors, etc.

§ 284. The proper affidavit having been made and filed, and the garnishment summons issued and duly served, the case is in court; and, although the affidavit is not conclusive, either upon the defendant or the garnishee,¹²⁰ yet if, for any reason, the garnishment should be dismissed, as that the garnishee is not liable to garnishment within the state,¹²¹ or that the defendant has property liable to execution sufficient to satisfy any judgment that may be recovered against him,¹²² such facts must be proved by the party seeking the dismissal of the proceedings. They will not be

such a manner that it would be a good service of process. It is sufficient that the principal defendant has notice of the pendency of the suit. *Corey v. Gale*, 13 Vt. 639; *Wires v. Griswold*, 26 Vt. 97.

¹¹⁷ *Hinkley v. St. Anthony Falls Water-Power Co.*, 9 Minn. 55 (Gil. 44); *Winner v. Hoyt*, 68 Wis. 278, 284, 32 N. W. 128; *Corning v. Hoyt*, 68 Wis. 294, 32 N. W. 138; *Emil Kiewert Co. v. Hoyt*, 68 Wis. 296, 32 N. W. 137.

¹¹⁸ *Trunkey v. Crosby*, 33 Minn. 464, 23 N. W. 846.

¹¹⁹ *Wise v. Rothschild*, 67 Iowa, 84, 24 N. W. 603.

¹²⁰ *Barr v. Perry*, 3 Gill (Md.) 313; *Corbin v. Goddard*, 94 Ind. 419; *P. Cox Manuf'g Co. v. August*, 51 Kan. 59, 32 Pac. 636; *Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

¹²¹ *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506.

¹²² *Orton v. Noonan*, 27 Wis. 572; *German-American Bank v. Butler-Mueller Co.*, 87 Wis. 467, 58 N. W. 746.

presumed. The proper practice in such cases is for the defendant or garnishee to make and file in court affidavits of the facts upon which he depends to have the proceedings dismissed, and thereupon move the court that the garnishee be discharged; and the plaintiff opposes the motion on counter affidavits.¹²³ When the affidavit appears on its face to be insufficient, the proper practice is to move to quash.¹²⁴

The Appearance of the Garnishee.

Manner, Right of, and How Enforced.

§ 285. The garnishee, having been duly subjected to the jurisdiction of the court, should appear and answer in the time and manner prescribed by law. The statutes provide various means to make the proceedings effectual in case the garnishee fails to appear in answer to summons duly served upon him. Some of them provide for an arrest of his person, to bring him bodily into court, and thus compel appearance,¹²⁵ and others provide that, upon his failure to appear, judgment shall be entered against him by default, as in or-

¹²³ Orton v. Noonan, 27 Wis. 572-586.

¹²⁴ "Ordinarily, no doubt, where a writ or order can only be issued upon an affidavit or verified complaint, a motion to quash such writ or order will properly call in question the sufficiency of such affidavit or complaint. *McGlennan v. Margowski*, 90 Ind. 150; *Milligan v. State*, 97 Ind. 355. This is so in all cases, we think, except where the statute authorizing and regulating the proceeding prescribes a different mode for testing 'the sufficiency of the order and of the affidavit.' In this latter case, the statutory mode is, of course, the only mode which can be safely pursued, or which will properly present the question." *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

¹²⁵ How. Ann. St. Mich. §§ 8033, 8034, 8061; *Jones v. Kemper*, 2 Cranch, C. C. 535, Fed. Cas. No. 7,472.

dinary cases. He has the same right, under such statutes, to appear and defend, or suffer default, as any other party, and may have an appearance stricken off which is entered without his authority.¹²⁶ A motion by a garnishee to set aside a judgment rendered against him by default, on the ground that he is not indebted to the defendant, constitutes a general appearance.¹²⁷ The attorney or agent who appears for the garnishee is presumed to be duly authorized to do so; but, if the garnishee can show that he had no authority, the appearance entered by such person will not be binding upon the garnishee.¹²⁸

Effect of General Appearance.

§ 286. In ordinary actions, the general appearance of any party operates as a waiver of all defects in the proceedings prior thereto; but such is not the case in garnishment suits, although it confers jurisdiction of the garnishee himself.¹²⁹ In discussing this question, the supreme court of Connecticut uses the following pointed language: "The debt attempted to be attached belonged to Stoddard [the defendant]. It was his property, and the plaintiff attempted to take it by process of law, against his will and consent. The de-

¹²⁶ *Albert v. Albert*, 78 Md. 338, 28 Atl. 388.

¹²⁷ *Wickham v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287.

¹²⁸ *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469; *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900.

The attorney who appears for the plaintiff in the garnishment suit need not be the attorney of record in the principal suit, and there need be no substitution. The suits are different. *Hinkley v. St. Anthony Falls Water-Power Co.*, 9 Minn. 55 (Gil. 44).

¹²⁹ *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418.

defendants [garnishees] might waive a matter pertaining to themselves alone, but they could not waive the rights of Stoddard. He had the right to insist that, if his property was taken away from him, it should be done strictly in accordance with law. It never has been so taken, and, for aught that appears, the defendants are liable to pay the claim to him.”¹³⁰ As no waiver by the garnishee in this regard can bind the defendant, justice demands that the garnishee himself should be permitted to raise the question at any stage of the proceedings.¹³¹

¹³⁰ *Raymond v. Rockland Co.*, 40 Conn. 401, 405; *Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. 721; *Ahrens & Ott Manuf'g Co. v. Patton Sash, Door & Building Co.*, 94 Ga. 247, 21 S. E. 523.

For a more particular discussion of this subject, see the pages where the matter in which the defect occurred is considered.

“Appearance could have no effect in the absence of that upon which a judgment must in such case be predicated.” *Heritage v. Armstrong*, 101 Mich. 85, 59 N. W. 439.

Appearance, answer, and plea do not waive any defects in the principal suit, but only those appearing on the face of the proceedings against the garnishee himself. He is under no obligation to examine the proceedings against the defendant, as it is the plaintiff's duty to see that he has a valid judgment against the defendant, such as will protect the garnishee. *Segar v. Muskegon Shingle & Lumber Co.*, 81 Mich. 344, 45 N. W. 982.

¹³¹ *Ahrens & Ott Manuf'g Co. v. Patton Sash, Door & Building Co.*, 94 Ga. 247, 21 S. E. 523. *Contra*, *Wickman v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287.

CHAPTER XIII.

THE DISCLOSURE OR ANSWER OF THE GARNISHEE.

- § 287. Its Nature—Evidence Merely, and Indisputable.
- 288. — Evidence Equivalent to an Answer in Chancery or One Witness.
- 289. — Pure Pleading, not Admissible in Evidence.
- 290. The Garnishee's Refusal to Answer—Special Appearance to Raise Objection.
- 291. — Improper Questions.
- 292. — Contumacious Refusal—Demanding Ruling before Answering.
- 293. When Answer may be Made—Under Writs Contemplating Interrogatories or Further Notice before Answer.
- 294. — Under Writs Requiring Appearance and Answer without Further Notice.
- 295. — Court may Extend the Time.
- 296. — Answer may be Made of Course, at Any Time before Default Entered, and by Permission Afterwards.
- 297. — Default against Plaintiff for not Taking Answer.
- 298. How the Answer should be Made.
- 299. By Whom Answer should be Made—The Plaintiff has a Right to Examine the Garnishee Personally.
- 300. — Who may Answer for a Corporation as Garnishee.
- 301. What the Answer should State, and How—Should Fully and Impartially State All Facts Affecting Garnishee's Liability.
- 302. — Effect of Failure to State Facts Correctly in the Answer.
- 303. — May State Facts on Information and Belief—Presumption of Truth.
- 304. — Cannot be Required to State Facts on Information.
- 305. — Double Liability from Defective Answer.
- 306. — Garnishee should Never Suffer Judgment by Default.
- 307. Exceptions to the Sufficiency of the Answer.
- 308. Extent of Plaintiff's Right to Examine the Garnishee.
- 309. Amending, Supplementing, Modifying, and Contradicting the Disclosure—Should be Liberally Allowed to Prevent Injustice.

- § 310. Amending, Supplementing, Modifying, and Contradicting the Disclosure—Answer not Amendable of Course, but by Permission.
311. — Some Amendments of Course, and Some of Right.
312. Construction and Effect to be Given to the Garnishee's Answer—Equivocal Statements—Language not Distorted.
313. — Statements of Fact and Conclusions of Law—Presumption of Truth.
314. — Liability must Clearly Appear, or Garnishee will be Discharged.
315. — When Disclosure Shows Prima Facie Liability.

Its Nature.

Evidence Merely, and Indisputable.

§ 287. Is the answer or disclosure of the garnishee to be treated as a pleading or as testimony? Upon this question various views are entertained by different courts, and by the same courts under different statutes. On the one extreme, it is held that the garnishee is the plaintiff's witness,—his only witness, except to ascertain more fully the matters stated in the disclosure; that the plaintiff cannot contradict or discredit him, and, failing to make out a case by this witness, he fails entirely.¹

Evidence Equivalent to Answer in Chancery or One Witness.

§ 288. Under the circuit court statute in Michigan, it is held that the disclosure does not stand upon the same footing as testimony; but it is the answer of a party, somewhat analogous in its functions to an an-

¹ See, ante, § 181.

Held, that the answer is evidence merely, and cannot be taken up on appeal, as part of the record, without a bill of exceptions, on the ground that it is a pleading. Rothrock, J., dissenting, in *Brainard v. Simmons*, 58 Iowa, 464, 9 N. W. 382, and 12 N. W. 484.

swer in chancery, and is to be treated by the same rules.² Passing down the line a step further, we find cases holding that, while the disclosure of the garnishee answers the purposes of a pleading, and is also evidential, it is not entitled to have the same effect as a defendant's answer to a bill in chancery, requiring the equivalent of two witnesses to overthrow it, but stands upon the same footing as other testimony, is a *prima facie* defense, and may be overturned by a preponderance of evidence.³ The weight of the answer is for the jury, not for the court.⁴

² *Allen v. Hazen*, 26 Mich. 146; *Whitfield v. Stiles*, 57 Mich. 410, 24 N. W. 119; *Dawson v. Iron Range & H. B. Ry. Co.*, 97 Mich. 33, 45, 56 N. W. 106; *Page v. Smith*, 25 Me. 256. Compare *Devries v. Buchanan*, 10 Md. 210.

The statements of the garnishee on his examination have the force of admissions in a plea. *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84. The garnishee's answer in justice court may be given in evidence against him in the circuit court on appeal as an admission. *Newell v. Blair*, 7 Mich. 103.

³ *Kergin v. Dawson*, 6 Ill. 86; *Schwab v. Gingerick*, 13 Ill. 697; *Truitt v. Griffin*, 61 Ill. 26; *Kelley v. Weymouth*, 68 Me. 197; *Adlum v. Yard*, 1 Rawle (Pa.) 163, 18 Am. Dec. 608; *Erskine v. Sangston*, 7 Watts, 150; *Holton v. South Pac. R. Co.*, 50 Mo. 151; *Ellison v. Tuttle*, 26 Tex. 283; *Henry v. Bew*, 43 La. Ann. 476, 9 South. 101; *Devries v. Buchanan*, 10 Md. 210; *Perea v. Colorado Nat. Bank of Texas (N. M.)* 27 Pac. 322; *Fairfield v. McNany*, 37 Iowa, 75.

AN UNSWORN ANSWER is not evidence. *Empire Car Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417.

BILL OF EXCEPTIONS NECESSARY: The answer of the garnishee, though in writing, is not part of the record, unless made so by bill of exceptions, or recitals of the judgment entry. *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43; *Gaines v. Beirne*, 3 Ala. 114; *Bostwick v. Beach*, 18 Ala. 80. If in writing, and identified by the judgment entry, it is considered part of the rec-

⁴ *Drake v. Buck*, 35 Iowa, 472.

A Pure Pleading, not Admissible in Evidence.

§ 289. On the other extreme, we find the court of Wisconsin and other courts holding to the effect that, after issue joined, the garnishee's answer is a pleading merely, and stands upon the same ground as the defendant's plea in an ordinary action at law; that, being a part of the record, the plaintiff is entitled to have it read to the jury for the purpose of showing any admissions of the garnishee made therein,⁵ but that it is not evidence, for the garnishee, of any of the facts stated therein; that it takes no proof to overthrow it, and the garnishee is not entitled to have it read to the jury.⁶ But, when the answer of the garnishee is treated as a pleading merely, it is not required to conform to the strict rules of pleading. It may be set forth in ordinary language, and the misuse of legal terms will

ord. Decatur, C. & N. O. Ry. Co. v. Crass, 97 Ala. 519, 12 South. 43; Wyman v. Stewart, 42 Ala. 163; Jones v. Howell, 16 Ala. 695.

The answer is evidence, and not a pleading, and no part of the record, unless included in a bill of exceptions. Brainard v. Simmons, 58 Iowa, 464, 12 N. W. 484; Id., 67 Iowa, 646, 21 N. W. 27.

CONTRA: Held, that the interrogatories and answers thereto by the garnishee are part of the record, without any bill of exceptions. Rankin v. Simonds, 27 Ill. 352.

⁵ Prentiss v. Danaher, 20 Wis. 311.

⁶ Keep v. Sanderson, 12 Wis. 352; Cushing v. Laird, 6 Ben. 408, 7 Am. Law Rev. 762, Fed. Cas. No. 3,509; Dawkins v. Gault, 5 Rich. Law (S. C.) 151; Zanz v. Stover, 2 N. M. 29; Myatt v. Lockhart, 9 Ala. 91; Price v. Mazange, 31 Ala. 701; Sevier v. Throckmorton, 33 Ala. 512; Lasley v. Sisloff, 7 How. (Miss.) 157; Smith v. Heidecker, 39 Mo. 157; Davis v. Knapp, 8 Mo. 657; McEvoy v. Lane, 9 Mo. 48.

Held that, when the plaintiff offers the disclosure in evidence, the garnishee is entitled to have the whole of it read to the jury. Godden v. Pierson, 42 Ala. 370.

not prejudice the garnishee when the facts are made to appear.⁷

The Garnishee's Refusal to Answer.

Special Appearance to Raise Objections.

§ 290. The garnishee should appear specially, to raise any objection to the sufficiency of the proceedings against him, or the right of the plaintiff to require him to answer thereunder; for, although he cannot waive any of the defendant's rights, or confer jurisdiction upon the court by appearing and answering, without objection, under defective proceedings, he can waive many of his own rights.⁸

Improper Questions.

§ 291. But, having appeared and submitted to examination, the garnishee may safely refuse to answer any questions concerning matter fully and explicitly stated in answer to previous interrogatories;⁹ or entirely impertinent;¹⁰ or which, being self-incriminat-

⁷ Ashby v. Watson, 9 Mo. 235; Case v. Dewey, 55 Mich. 116, 20 N. W. 817.

⁸ See ante, §§ 253, 270.

In Iowa, it is held that the garnishee, having neglected to make demand for his fees and mileage, or object to their nonpayment, at the time the summons was served upon him, or at some other time before the day appointed for making answer, could not, upon coming into court, demand payment of them before answering. Stockberger v. Lindsey, 65 Iowa, 471, 21 N. W. 782.

⁹ Mack v. Brown, 20 Mich. 335; Carrique v. Sidebottom, 3 Metc. (Mass.) 297. Compare Ullmeyer v. Ehrmann, 24 La. Ann. 32.

¹⁰ Nash v. Gale, 2 Minn. 310; Mack v. Brown, 20 Mich. 335; Wood v. Wall, 24 Wis. 647; Humphrey v. Warren, 45 Me. 216; Callender v. Furbish, 46 Me. 226; Warner v. Perkins, 8 Cush. (Mass.) 518; State Nat. Bank v. Boatner, 39 La. Ann. 843, 2 South. 589; Corbyn v. Boll-

ing, might expose him to a criminal prosecution, or be used against him in such a prosecution;¹¹ or which he can answer only by divulging privileged communications.¹² Some of the courts also hold that the garnishee cannot be required to answer any question which might impair or impeach his title to real estate,¹³ or deprive him of a defense to an action against him by the principal defendant.¹⁴

man, 4 Watts & S. (Pa.) 342; *Knapp v. Levanway*, 27 Vt. 298. But see *Prince v. Heenan*, 5 Minn. 347 (Gil. 279).

¹¹ *Boardman v. Roe*, 13 Mass. 104; *Neally v. Ambrose*, 21 Pick. (Mass.) 185.

A statute in Michigan provides that the garnishee's disclosure shall not be used against him in any criminal prosecution, except for perjury in making it. How. Ann. St. § 8084.

¹² *Shaughnessy v. Fogg*, 15 La. Ann. 330; *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 South. 589.

But a garnishee cannot, on the ground that his knowledge is privileged as a professional secret, avoid answering questions tending to show to whom the property in his possession belongs, or how he has disposed of it, or use it as a pretext to conceal the defendant's property in his possession. *Id.*; *Comstock v. Paine*, 18 La. 479; *Williams v. Young*, 46 Iowa, 140; *White v. Bird*, 20 La. Ann. 188, 96 Am. Dec. 393; *State ex rel. Hardy v. Gleason*, 19 Or. 159, 23 Pac. 817.

A wife cannot refuse to answer whether she has in her possession property belonging to her husband, on the ground that it would be giving testimony against him; for the law will presume that he wants to pay his debts, and wants the garnishee charged if the facts justify it. *Thompson v. Silvers*, 59 Iowa, 670, 13 N. W. 854. *Contra*, *Berles v. Adsit*, 102 Mich. 495, 60 N. W. 967.

¹³ *Boardman v. Roe*, 13 Mass. 104; *Russell v. Lewis*, 15 Mass. 126; *Moor v. Towle*, 38 Me. 133. Compare *Kearney v. Nixon*, 19 La. Ann. 16; *Battles v. Simmons*, 21 La. Ann. 416. *Contra*, *Bell v. Kendrick*, 8 N. H. 520.

"The constitutional provision that no subject shall be compelled to furnish evidence against himself does not relate to questions of property." *Devoll v. Brownell*, 5 Pick. (Mass.) 448.

¹⁴ *Gee v. Warwick*, 2 Hayw. (N. C.) 354.

Contumacious Refusal—Demanding Ruling before Answering.

§ 292. If the garnishee contumaciously and designedly refuses to answer proper questions put to him, or his answers are not responsive, he may be visited with such penalty as the court may direct, under the statute governing the case,—usually, a judgment by default, the same as if he had entirely refused or neglected to answer.¹⁵ But, before passing judgment against him for refusal to answer, the court should direct the garnishee that the question he refuses to answer is proper and pertinent, and thereafter give him an opportunity to answer it.¹⁶ He has a right to have the correctness of a proposed inquiry adjudicated by the court, and is not bound to submit to any and every conceivable investigation without objection, or, if he objects, become liable to pay the entire debt in the principal action.¹⁷ The action of the trial court in refusing to pass judgment against the garnishee for his

¹⁵ Richardson v. White, 19 Ark. 24; Scamahorn v. Scott, 42 Iowa, 529; De Blanc v. Webb, 5 La. 82; Shaw v. Bunker, 2 Mete. (Mass.) 376; Patterson v. Buckminster, 14 Mass. 144.

Though the garnishee deny all liability he cannot refuse to answer pertinent questions, eliciting the facts. If he does, he may be charged; for he puts his conclusion of law in the place of that of the court, and denies the court opportunity to test its correctness. Mansfield v. New England Express Co., 58 Me. 35.

CONTEMPT: Held, that a refusal to answer puts the garnishee in contempt of court, for which he may be punished; but no judgment can be passed against him therefor. Hamill v. Champlin, 12 R. I. 124; Falk v. Flint, Id. 14; Hibernia Savings & Loan Soc. v. Superior Court of Inyo Co., 56 Cal. 265.

¹⁶ Wood v. Wall, 24 Wis. 647.

It is the duty of the court to direct the garnishee what questions he should answer, and what he may safely decline to answer. Mansfield v. New England Express Co., 58 Me. 35.

¹⁷ Sawyer v. Webb, 5 Iowa, 314; Simon v. Ash, 1 Tex. Civ. App.

refusal to answer a pertinent question, being an exercise of its discretion, will not be reviewed on appeal.¹⁸

When Answer may be Made.

Under Writs Contemplating Interrogatories or Further Notice before Answer.

§ 293. Under some statutes, the service of the writ merely operates as an attachment of the property of the defendant in the garnishee's possession, and the debts owing by him to the defendant, and he is not required to answer till interrogatories are served on him, or he is notified to appear at a stated time and place and make answer.¹⁹ Under such statutes, of course, the garnishee cannot be put in default for not

202, 20 S. W. 719; *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 South. 589.

¹⁸ *Worthington v. Jones*, 23 Vt. 546, 550; *Knapp v. Levanway*, 27 Vt. 298.

¹⁹ *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *McCourtie v. Davis*, 2 Gilman (Ill.) 298; *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223.

DEFAULT BEFORE FILING INTERROGATORIES: "Where the record stated that the garnishee was called, failed to appear, and was thereupon defaulted, held, that it was not necessary for the plaintiff to prepare and propound in advance the interrogatories contemplated by the statute. If, when called, he answers, it is then the duty of the party who seeks to charge him to have the interrogatories propounded and the answers taken, either through a commissioner or otherwise, as the court may direct. Where he fails to appear, however, the filing of the interrogatories with the clerk is not necessary to entitle the plaintiff to a default." *Parmenter v. Childs*, 12 Iowa, 22.

WAIVER: By appearing and answering, the garnishee waives his right to have his answer taken by commissioner in his own county, and judgment may be passed against him for defective answer. *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418.

answering, and no answer is required until the interrogatories are filed for him to answer, or he is notified to appear for that purpose, or the other requirements of the statute to enable the plaintiff to demand an answer have been complied with.²⁰

Under Writs Requiring Appearance and Answer without Further Notice.

§ 294. The answer should not be made before the time appointed therefor in the summons, but cannot be treated as premature unless excepted to for that reason, and then it may be cured by amendment.²¹ On

²⁰ Cohn v. Tillman, '66 Tex. 98, 18 S. W. 111.

INTERROGATORIES BEFORE DEFAULT: "It was irregular to take the default until interrogatories were exhibited for the garnishee to answer. Until then there was nothing for him to answer, and he was not bound to appear." Stickley v. Little, 29 Ill. 315.

"Until the creditor had filed interrogatories, he is not in a position to demand an answer." Michigan Cent. Ry. Co. v. Keohane, 31 Ill. 144.

"The plaintiffs had no right, at the April term, on filing interrogatories, to take a conditional judgment. * * * They [the garnishees] had until the third day of the next succeeding term in which to file their answers." Towner v. George, 53 Ill. 168.

NOTICE TO ANSWER BEFORE COMMISSIONER: "Where a commissioner is appointed to take the answer of the garnishee, and the court does not fix the time and place for the answer to be taken, it is to be inferred that the intention of the court was that the commissioner should fix the time and place. This the commissioner may do by serving a notice on the garnishee of the time and place at which he is to answer. We know of no other way. * * * He could not do it by a mere mental determination. * * * No notice having been served upon the garnishee in these cases of any time or place fixed by the commissioner for taking his answers, he was not, we think, in default for not giving his answers." Thomas v. Hoffman, 62 Iowa, 125, 17 N. W. 431.

²¹ Plant v. Mutual Life Ins. Co., 92 Ga. 636, 19 S. E. 719; Burrus v. Moore, 63 Ga. 405, 409.

the other hand, it should be made at the time named therefor in the writ;²² and, if the time for answering is accidentally omitted, the garnishee must, nevertheless, answer within the time allowed by the statute.²³

Court may Extend the Time.

§ 295. But the court may, upon cause shown, allow additional time for answering,²⁴ or, in the exercise of its discretion, refuse further time.²⁵ But, the case having been called, and the plaintiff having demanded a judgment against the garnishee for his failure to answer, held, that it was error for the trial court to allow the attorney for the garnishee further time "to look into the matter," and see if he had a defense, without giving any reason or explanation for his failure to file his answer before, the statute declaring that, for failure to answer before a given time, the plaintiff should be entitled to judgment;²⁶ but refusal to enter

²² Emanuel v. Smith, 38 Ga. 602.

When the term at which the writ is made returnable is abolished, and all matters set over to the next term, the garnishee must answer at such next term. Mutual Life Ins. Co. v. Moss, 93 Ga. 272, 20 S. E. 308.

Held, that the garnishee has the whole term after service in which to file his affidavit, Phetteplace v. Lincoln, 1 R. I. 287; although judgment is taken against the defendant in the first part of the term, Sweet v. Read, 12 R. I. 121.

²³ Hearn v. Adamson, 64 Ga. 608.

An appearance to answer is a waiver of the irregularity of the writ in appointing an impossible time. Wellover v. Soule, 30 Mich. 481.

²⁴ Talladega Mercantile Co. v. McDonald, 97 Ala. 508, 12 South. 34; Karnes v. Pritchard, 36 Mo. 135; Lorman v. Phoenix Ins. Co., 33 Mich. 65; Barber v. Howd, 85 Mich. 221, 48 N. W. 539; Proseus v. Mason, 12 La. 16; Emanuel v. Smith, 38 Ga. 602.

²⁵ Lehman v. Hudman, 85 Ala. 135, 4 South. 741.

²⁶ Bearden v. Metropolitan St. Ry. Co., 82 Ga. 605, 9 S. E. 603.

default against a garnishee for not answering before the case is called is not error.²⁷

Answer may be Made of Course, at Any Time before Default Entered, and by Permission Afterwards.

§ 296. In the absence of any order of court allowing additional time, the garnishee may make answer at any time before default for want thereof has been entered.²⁸ And, though judgment has been entered against the garnishee for want of answer, it is in the discretion of the trial court to set it aside, on the coming in of the garnishee's answer, showing good and sufficient legal excuse for not answering before.²⁹ The order setting aside the default should fix the time within which the answer is to be made.³⁰

²⁷ McCallum v. Brandt, 48 Ga. 439.

²⁸ Talladega Mercantile Co. v. McDonald, 97 Ala. 508, 12 South. 34; Penn v. Pelan, 52 Iowa, 535, 3 N. W. 540; McCallum v. Brandt, 48 Ga. 439.

Held, that default for want of answer cannot be entered against the garnishee till the plaintiff has recovered judgment in the main action against the defendant. Arnold v. Gullatt, 68 Ga. 810; Rose v. Whaley, 14 La. Ann. 374.

²⁹ Goodrich v. Hopkins, 10 Minn. 162 (Gil. 130); Russell v. Freedman's Sav. Bank, 50 Ga. 575; Talladega Mercantile Co. v. McDonald, 97 Ala. 508, 12 South. 34. See, also, post, § 386.

After default the garnishee cannot answer as a matter of right. McDonald v. Rennel, 27 Law Rep. 157, Fed. Cas. No. 8,765.

Held that, when default for want of answer had been entered, and afterwards the garnishee appeared and made answer, and the cause was by consent of the parties adjourned, and further proceedings had, judgment could not thereafter be entered against the garnishee for his failure to answer. Lorman v. Phoenix Ins. Co., 33 Mich. 65.

³⁰ Goodrich v. Hopkins, 10 Minn. 162, Gil. 130.

Default against Plaintiff for not Taking Answer.

§ 297. If the garnishee appears at the appointed time, ready to answer, and the plaintiff declines to take the answer, the garnishee should be discharged,³¹ unless a good cause appears for not taking it then,³² in which case the garnishee may, at any time afterwards, apply to the court to have it taken.* In proceedings under statutes which do not require the garnishee to answer till further notice or interrogatories are served on him, it has been held that these must be served within the time limited by law.³³

How the Answer should be Made.

§ 298. Some of the statutes contemplate an oral examination of the garnishee in open court, while others authorize the filing of a written answer, in the first instance, at least. Others authorize the officer summoning the garnishee to take his answer at the same time, or intend that it shall be taken before a commissioner, and many of them provide various modes, to

³¹ *Ogden v. Mills*, 3 Cal. 253. See, also, post, § 383.

Held, that the failure of the plaintiff to appear before the justice on the return of the writ operated as a discontinuance, which the garnishee could not waive, and bind the defendant. *Johnson v. Dexter*, 38 Mich. 695.

³² *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659.

*Id.

³³ *Case v. Noyes*, 16 Or. 539, 21 Pac. 40.

Delay of two years after serving the garnishment, before citing the garnishee to answer, held to amount to an abandonment of the proceeding. *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223.

A delay of one year entitles the garnishee to presume the writ has been abandoned. *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. 111.

suit the convenience of the parties or the circumstances of the different cases.³⁴ These matters are usually fully covered by the statutes, which furnish a complete guide. If a written answer is filed, it should be entitled in the case, or in some manner identified with it,³⁵ and should otherwise comply with the rules of pleading and practice pertaining to judicial papers; but, when the disclosure is taken in open court, orally, and reduced to writing by the judge or other officer of the court, it need not be signed by the garnishee, although, probably, it always should be.³⁶ The plaintiff has the undoubted right to demand that the garnishee answer under oath, especially if the statute so direct;³⁷ but, even then, it is merely the plaintiff's privilege, and, if he does not require it, an answer without oath is sufficient.³⁸

³⁴ When statutes authorize the officer to take the answer in certain cases upon the direction of the plaintiff, the request is the officer's protection, not his authority. His writ is his authority. *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933.

³⁵ An erroneous date in the margin, not referred to in the body of the answer, is no part of it, and does not show that it was not made for the case in which it was filed. *Eddy v. Providence Mach. Co.*, 15 R. I. 7, 22 Atl. 1116.

³⁶ *Sutherland v. Burrill*, 82 Mich. 13, 45 N. W. 1122; *Newell v. Blair*, 7 Mich. 103.

³⁷ *Oliver v. Chicago & A. Ry. Co.*, 17 Ill. 587; *Cornell v. Payne*, 115 Ill. 63, 3 N. E. 718; *Chicago, R. I. & P. Ry. Co. v. Mason*, 11 Ill. App. 525; *Empire Car Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417; *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. 719.

³⁸ *Sutherland v. Burrill*, 82 Mich. 13, 45 N. W. 1122; *Maynards v. Cornwell*, 3 Mich. 311; *Roberts v. Landecker*, 9 Cal. 266.

By Whom Answer should be Made.

The Plaintiff has a Right to Examine the Garnishee Personally.

§ 299. If the writ is issued in pursuance of a statute directing that the garnishee appear in court, in response to the summons, and answer such questions as may be put to him concerning the property in his hands and the debts due from him belonging to the defendant, he cannot deprive the plaintiff of his right to a personal examination by filing a written answer,³⁹ nor by sending an agent or attorney to make answer for him. He must answer in person.⁴⁰ But the right to require a personal examination is the plaintiff's privilege, and, if he does not object, an answer in writing or by agent is sufficient, and the liability of the garnishee will not be affected by the manner in which it is made.⁴¹ Where there are several joint garnishees, one may answer for all, and the answer will be sufficient, unless the plaintiff excepts at the time, and applies to the court to require the others to answer individually.⁴² The plaintiff, having permitted the garnishee to file a written answer, should still be allowed to examine him orally, if the answer filed is meager,

³⁹ Penn v. Pelan, 52 Iowa, 535, 3 N. W. 540; Scales v. Swan, 9 Port. (Ala.) 163; Brainard v. Simmons, 58 Iowa, 464, 9 N. W. 382; Barber v. Howd, 85 Mich. 221, 48 N. W. 539.

⁴⁰ Cornell v. Payne, 115 Ill. 63, 3 N. E. 718; Dickson v. Morgan, 7 La. Ann. 490.

⁴¹ Barber v. Howd, 85 Mich. 221, 48 N. W. 539; Roberts v. Lan-decker, 9 Cal. 266.

⁴² Hennessey v. Farrell, 4 Cush. (Mass.) 268; Gerry v. Gerry, 10 Allen (Mass.) 160; Anderson v. Wanzer, 6 Miss. 587, 37 Am. Dec. 170.

indefinite, or evasive.⁴³ But, if the statute does not give the plaintiff a right to examine the garnishee orally in open court, he cannot demand it;⁴⁴ and the garnishee may answer by letter directed to the judge of the court, or by his attorney, or in any other manner that the statute under which the proceedings are had may authorize, and the court direct.⁴⁵

Who may Answer for a Corporation as Garnishee.

§ 300. As, from the nature of a corporation, it can act only through its officers and agents, the right of the plaintiff to examine the garnishee personally is confined to proceedings against natural persons.⁴⁶ Corporations answer by their officers and agents; but it is not every officer or agent of a corporation that is authorized to answer for it, or can bind it by answering. None but the proper officers or agents can do this;⁴⁷ and who are proper persons to answer depends upon the statute regulating the proceeding. Usually, the person served may answer for the corpo-

⁴³ Wright v. Swanson, 46 Ala. 708; Seamon v. Bank, 4 W. Va. 339; Thompson v. Silvers, 59 Iowa, 670, 13 N. W. 854.

⁴⁴ Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464, 50 N. W. 389; Elwood v. Cowley, 64 Iowa, 68, 19 N. W. 857.

⁴⁵ Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500; Macomber v. Wright, 35 Me. 156.

⁴⁶ Bailey v. Union Pac. Ry. Co., 62 Iowa, 354, 17 N. W. 567; Bray v. Wallingford, 20 Conn. 416.

Held, that plaintiff cannot require any agent of a corporation to submit to personal examination in circuit court. Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 470, 50 N. W. 389. Contra, Bailey v. Union Pac. Ry. Co., above. See, also, Baltimore & O. Ry. Co. v. Gallahue, 12 Grat. (Va.) 655; Knox v. Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

⁴⁷ Karp v. Citizens' Nat. Bank of Saginaw, 76 Mich. 679, 43 N. W.

ration, whoever he may be;⁴⁸ but he is not the only person who can answer for it.⁴⁹ Any officer having knowledge of the facts, and whom the corporation may

680; *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

A bookkeeper is not such an officer. *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 908.

Held, that the cashier of a bank is not a proper officer. *Branch Bank v. Poe*, 1 Ala. 396.

Held, that a corporation garnishee may answer by its attorney. *Head v. Merrill*, 34 Me. 586. *Contra*, *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. 719.

Held, that an answer signed and sworn to by the vice president of the garnishee is, prima facie, by a proper person. *Gerhard Hardware Co. v. Texas Cotton-Press Co.* (Tex. Civ. App.) 26 S. W. 168.

The treasurer of a savings association may answer for it. *White v. Springfield Inst. for Sav.*, 134 Mass. 232.

CORPORATE SEAL AFFIXED TO ANSWER: Held, that the secretary of a corporation is a proper person to make answer under oath, and affix the corporate seal. *Oliver v. Chicago & A. Ry. Co.*, 17 Ill. 587.

Held, that a municipal corporation may answer by the treasurer, on whom service was made, and the answer need not be under the corporate seal. *Montgomery v. Van Dorn*, 41 Ala. 505.

A disclosure by the clerk of a school district, in the presence and with assistance of the prudential committee, binds the district. *Udall v. School Dist. No. 4*, 48 Vt. 588.

Held, that the answer must be made by the chief officer of the corporation, and under its corporate seal. *Callahan v. Hallowell*, 2 Bay (S. C.) 8; *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655; *Branch Bank v. Poe*, 1 Ala. 396; *Planters' & Merchants' Bank v. Leavens*, 4 Ala. 753.

OATH OF AUTHORITY: An Alabama statute requires that, when a corporation answers as garnishee, the agent or officer answering shall make oath that he has authority. This is for the protection of both plaintiff and garnishee, and an answer without this oath may be ignored. *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

⁴⁸ *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 470, 50 N. W. 389; *Lorman v. Phenix Ins. Co.*, 33 Mich. 65.

⁴⁹ *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599.

authorize for the purpose, may make disclosure for it;⁵⁰ but the plaintiff is entitled to an answer by one at least presumably possessing the requisite information to answer truly.⁵¹

What the Answer should State, and How.

Should Fully and Impartially State All Facts Affecting Garnishee's Liability.

§ 301. The garnishee has a right to state the case fully in his answer, and cannot be confined to answering categorical questions.⁵² He should not rest upon a statement of his conclusions of law concerning his obligations to the defendant, but should let the facts appear, and leave the court to determine what is their effect.⁵³ The principal attention, in drafting the answer, should be directed to the end that all facts in any way affecting the liability of the garnishee may be fully stated, and as definitely and positively as the knowledge of the garnishee will permit.⁵⁴ But, this

⁵⁰ Bailey v. Union Pac. Ry. Co., 62 Iowa, 354, 17 N. W. 567; Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500; Chicago, R. I. & P. Ry. Co. v. Mason, 11 Ill. App. 525.

⁵¹ Decatur, C. & N. O. Ry. Co. v. Crass, 97 Ala. 519, 12 South. 43; Plant v. Mutual Life Ins. Co., 92 Ga. 636, 19 S. E. 719.

⁵² Bebb v. Preston, 1 Iowa, 460, 3 Iowa, 325; Cross v. Brown (R. I.) 33 Atl. 147, 159.

⁵³ Shaw v. Bunker, 2 Metc. (Mass.) 376; Mortland v. Little, 137 Mass. 340; Toothaker v. Allen, 41 Me. 324; Mansfield v. New England Exp. Co., 58 Me. 35; Rutherford v. Fullerton, 89 Ga. 353, 15 S. E. 471.

⁵⁴ Whitman v. Hunt, 4 Mass. 272; Graves v. Walker, 21 Pick. (Mass.) 160; Edler v. Hasche, 67 Wis. 653, 660, 31 N. W. 57; Crain v. Gould, 46 Ill. 293; Hitchcock v. Galveston Wharf Co., 50 Fed. 263; Baker's Appeal (Pa. Sup.) 3 Atl. 766.

PLAINTIFF ENTITLED TO FULL DISCLOSURE: When the

appearing to have been done, the answer will always be sufficient.⁵⁵ It is neither safe nor proper for him to state that any alleged claim is colorable, collusive, or fraudulent. He should state what he knows or is informed of the claim, and leave the plaintiff to bring in the claimant to prove his rights.⁵⁶ Equal care should be used to guard against admitting a liability when none exists, for his admissions can cut off the rights of no one but himself.⁵⁷

Effect of Failure to State Facts Correctly in the Answer.

§ 302. It has been held that, once having admitted liability, he is estopped thereafter to deny it.⁵⁸ However, the statement does not find support in other decisions. Failure to observe these rules may, on the one hand, result in charging the garnishee, when he should not be charged, and, on the other, rendering

garnishee cannot speak positively, he should state what facts he knows, and what he believes, together with the grounds of his belief. *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. 719.

"The plaintiff was entitled to have, from garnishee, a specific and definite statement of 'what effects, if any, of defendant he had in his possession when the writ was served.' The effects in this case being notes and accounts, the garnishee should have stated the names of the parties owing same, the amount and date of each, when due, and rate of interest, if any." *Cullers v. City Bank of Sherman* (Tex. Civ. App.) 27 S. W. 900.

⁵⁵ *Harris v. Aiken*, 3 Pick. (Mass.) 1; *Ormsby v. Anson*, 21 Me. 23; *Rice v. Whitney*, 12 Ohio St. 358; *Wilhelmi v. Haffner*, 52 Ill. 222; *Work v. Brown*, 38 Neb. 498, 56 N. W. 1082.

⁵⁶ *Phipps v. Rieley*, 15 Or. 494, 16 Pac. 185; *McAuliffe v. Farmer*, 27 Mich. 76; *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 Pa. St. 589, 31 Atl. 949.

⁵⁷ *Hosley v. Scott*, 59 Mich. 420, 26 N. W. 659; *Knisely v. Evans*, 34 Ohio St. 158; *Hirth v. Pfeifle*, 42 Mich. 31, 3 N. W. 239; *Wetherwax v. Paine*, 2 Mich. 555.

⁵⁸ *Woodbridge v. Winthrop*, 1 Root (Conn.) 557.

the proceedings no protection to him against future liability to persons interested, including the principal defendant himself.⁵⁹ In the first place, the plaintiff is entitled to have disclosed every fact tending to show that the garnishee is chargeable, and, for his failure to state all these facts, so far as he is able, may except to the sufficiency of the answer, file interrogatories, demand a trial on the disclosure, or have such other relief as the statute under which the proceedings are conducted may authorize, and, if the answer is manifestly equivocal or evasive, may, under many statutes, move for judgment against the garnishee upon that ground, all of which will be more fully considered hereafter.⁶⁰

May State Facts on Information and Belief—Presumption of Truth.

§ 303. In the next place, the garnishee should, for his own protection, state every fact tending to show that he should not be charged;⁶¹ and, in this, he is not confined to those facts which he can swear to of his own knowledge, but may state, upon information and belief, whatever he has heard from claimants or others,⁶² and may incorporate into and make a part of his answer the affidavit of any person, or any print-

⁵⁹ See ante, §§ 206, 207.

⁶⁰ Post, §§ 307, 308, 312.

⁶¹ *Drake v. Lake Shore & M. S. Ry. Co.*, ¹69 Mich. 168, 171, 37 N. W. 70; *John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 84 Wis. 1, 54 N. W. 108. See, also, *Black v. Brisbin*, 3 Minn. 360 (Gil. 253), 74 Am. Dec. 762; ante, § 206, 207.

⁶² *Sexton v. Amos*, 39 Mich. 695, 697; *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 171, 37 N. W. 70; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050; *Crossman v. Crossman*, 21 Pick. (Mass.) 21; *Shaw v. Bunker*, 2 Metc. (Mass.) 376; *Fay v. Sears*, 111 Mass. 154.

ed or written document, letter, or the like, which, in his opinion, may affect his liability.⁶³ And the presumption of truth of the answer extends to facts stated upon information and belief, or contained in the documents made part of the answer, as well as to matters positively sworn to.⁶⁴ In Massachusetts, it is held that the garnishee should swear that he believes to be true such statements as he incorporates into his answer and which he cannot positively verify, and that, failing to do so, so much of the answer is merely nugatory.⁶⁵

⁶³ Willard v. Sturtevant, 7 Pick. (Mass.) 194; Kelly v. Bowman, 12 Pick. 383; Chase v. Bradley, 17 Me. 89; Bell v. Jones, 17 N. H. 307.

But held, that an affidavit filed by the principal defendant during the examination of the garnishee, but not made a part of the garnishee's answer, could not be considered in determining the liability of the garnishee. Minchin v. Moore, 11 Mass. 90.

A letter being shown the garnishee on his examination, he identified the signature as genuine, but nothing was said of the contents of the letter. Held, that the letter was no part of the answer, and its contents were not in evidence. Stackpole v. Newman, 4 Mass. 85.

⁶⁴ Sexton v. Amos, 39 Mich. 695, 698; Crossman v. Crossman, 21 Pick. (Mass.) 21; Bostwick v. Bass, 99 Mass. 469; Fay v. Sears, 111 Mass. 154; First Nat. Bank of Clinton v. Bright, 126 Mass. 535; Seward v. Arms, 145 Mass. 195, 13 N. E. 487; Burnham v. Dunn, 35 N. H. 556; Lackett v. Rumbaugh, 45 Fed. 23.

⁶⁵ Hawes v. Langton, 8 Pick. (Mass.) 67; Kelly v. Bowman, 12 Pick. (Mass.) 383; Born v. Staaden, 24 Ill. 320; John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee, 90 Wis. 464, 63 N. W. 1018.

But this would seem not to be generally required. Sexton v. Amos, 39 Mich. 695.

Held, that an answer not made under oath is no evidence for the garnishee to prove any fact therein set up. Empire Car Roofing Co. v. Macey, 115 Ill. 390, 3 N. E. 417.

Cannot be Required to State Facts on Information.

§ 304. Of course, the garnishee cannot be compelled to make any letter or affidavit of any person a part of his answer, or state anything upon information and belief which he does not choose to, but may take upon himself the responsibility of deciding the truth or falsity of such statements, and stand the consequence of an erroneous decision by being afterwards compelled to make satisfaction to the true owner.⁶⁶ If, for want of information, the garnishee is unable to state any fact which he may deem important, as affecting his liability, he should explicitly so declare, and, having made the importance of the fact to appear, and that he has not sufficient knowledge to determine it, the burden is then upon the plaintiff to make out his case, the same as in an ordinary action.⁶⁷

Double Liability from Defective Answer.

§ 305. The following are a few of the cases in which the garnishee will be again liable for the amount garnished, because of his failure to state facts within his knowledge concerning the rights of third parties: Failure to state that the debt or property sought to be garnished is exempt from garnishment;⁶⁸ failure to disclose that other persons than the defendant claim to own the property, or have an interest in it;⁶⁹ failure to disclose that, before being summoned in the

⁶⁶ Hawes v. Langton, 8 Pick. 67; Kelly v. Bowman, 12 Pick. (Mass.) 383.

⁶⁷ Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050.

⁶⁸ See ante, § 83.

⁶⁹ See ante, §§ 206, 207.

present suit, he has been summoned as garnishee of the defendant in a suit by another creditor;⁷⁰ failure to disclose a previous suit for the demand, in another state, by the principal defendant;⁷¹ failure to disclose that the principal defendant has become a bankrupt, and his property was in the hands of the assignee in bankruptcy.⁷²

Garnishee should Never Suffer Judgment by Default.

§ 306. To this list we may add the cases in which the garnishee has afterwards been held liable to the principal defendant because of being unable to prove that the demand sued on is the same upon which he was charged as garnishee.⁷³ To avoid this calamity, the garnishee should never allow a judgment to go against him by default for want of answer, but should make full answer, setting up sufficient facts to identify, clearly, the particular demand on which he is liable to the defendant, to the end that, when afterwards sued by the defendant, he may make out his defense by merely producing the record of the garnishment suit.

Exceptions to the Sufficiency of the Answer.

§ 307. If the disclosure made in court, or the answer filed, by the garnishee, is not satisfactory to the plaintiff, he must look to the statute under which the proceedings are conducted to learn what course he

⁷⁰ See ante, § 190.

⁷¹ Whipple v. Robbins, 97 Mass. 107.

⁷² Nugent v. Opdyke, 9 Rob. (La.) 453.

⁷³ See ante, § 220.

should take; for the remedy is purely statutory and artificial, the mode of conducting it is regulated and defined by enactment,⁷⁴ and there is no authority for any action outside of it.⁷⁵ Many of the statutes provide that, if the plaintiff deems the answer made to be insufficient, he may file special interrogatories to draw out the matter not stated; but he is not required to avail himself of these statutes, and may take issue on the answer as made.⁷⁶ Any answer is sufficient, unless excepted to.⁷⁷ In some states, judgment may be rendered against the garnishee on the ground that his answer is insufficient;⁷⁸ or, it being evident that it is

⁷⁴ *Townsend v. Cass* Circuit Judge, 39 Mich. 407; *Smith v. Holland*, 81 Mich. 471, 45 N. W. 1017; *Everton v. Parker*, 3 Wash. St. 331, 28 Pac. 536; *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392.

⁷⁵ See ante, § 6.

But held, that the court may, without express statutory authority, require the garnishee to make his answer more specific by furnishing a copy of the contract on which he relies as a defense. *Lusk v. Galloway*, 52 Wis. 164, 8 N. W. 608.

⁷⁶ *Bebb v. Preston*, 3 Iowa, 325; *Hobson v. Kelly*, 87 Mich. 187, 49 N. W. 533.

⁷⁷ *Illinois Cent. Ry. Co. v. Cobb*, 48 Ill. 402.

Held, that taking issue on the answer does not waive the objection that the answer is insufficient. *Gerhard Hardware Co. v. Texas Cotton Press Co.* (Tex. Civ. App.) 26 S. W. 168.

⁷⁸ *Melton v. Lewis*, 74 Tex. 411, 12 S. W. 93; *Gerhard Hardware Co. v. Texas Cotton Press Co.* (Tex. Civ. App.) 26 S. W. 168; *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43; *Dawson v. Maria*, 15 Or. 556, 16 Pac. 413.

A judgment by default is properly rendered against a garnishee who, instead of answering the questions propounded, makes a general denial of indebtedness, although the return of the officer executing the commission does not certify, as required by law, whether the garnishee failed or refused to appear and answer. *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697.

ORDER TO ANSWER FURTHER: When, upon motion of the
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made in bad faith, it may be treated as fraudulent, and be disregarded.⁷⁹ There are other cases holding that the disclosure may be stricken from the files for that cause, and judgment nisi rendered,⁸⁰ or the garnishee ruled to show cause why judgment should not

plaintiff, the court requires the garnishee to answer more specifically upon certain matters, giving him one week in the next term of court in which to amend his answer, default may be entered against the garnishee if he fails to answer within that time; and such default should be made absolute at the same term at which it is entered, and the garnishee rendered liable for the amount of the judgment in the main action. *Scamahorn v. Scott*, 42 Iowa, 529.

OVERSIGHT: When the garnishee shows that the defect was an oversight, and offers to amend, the judgment against him for the insufficiency of the answer should be set aside. *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418.

NOT GROUND FOR JUDGMENT: Under the Michigan justice court act, it is held that the fact that the garnishee's answer is insufficient cannot help the plaintiff, for only by it can he recover. *Lorman v. Phoenix Fire Ins. Co.*, 33 Mich. 65.

When the garnishee answered, and the court, considering the answer insufficient, entered a judgment against him as for a default, held, that the statute did not authorize such judgment, and it was not conclusive against the garnishee in an action upon it. *Eddy v. Providence Mach. Co.*, 15 R. I. 7, 22 Atl. 1116.

⁷⁹ *Parker v. Page*, 38 Cal. 522.

Upon the opinion that the disclosure was uncandid and evasive, and that he had power to treat it summarily, the judge made an order, reciting that the garnishees were in possession of property belonging to the defendant, which was denied by the disclosure, and ordered them to pay it into court. Held, that no such practice was authorized. *Townsend v. Cass Circuit Judge*, 39 Mich. 407.

An answer, being on file, cannot be ignored. *Threefoot v. Whittle* (Miss.) 15 South. 120.

⁸⁰ *Scales v. Swan*, 9 Port. (Ala.) 163; *Mims v. Parker*, 1 Ala. 421; *White v. Kahn* (Ala.) 15 South. 595; *Brainard v. Simmons*, 58 Iowa, 464, 9 N. W. 382.

be rendered against him for not making a more specific answer.⁸¹

The Extent of the Plaintiff's Right to Examine the Garnishee.

§ 308. Having discussed the matters concerning which the garnishee cannot be required to answer,* we now come to consider the plaintiff's right to examine the garnishee, as given by statute. If the answer of the garnishee is full and explicit upon all matters concerning which it is sought to charge him, of course, there is no cause for further examination.⁸² But some statutes allow questions to be put to the garnishee as to his knowledge of property or debts owned by the defendant and held or owed by other persons.† The plaintiff has a right to require the garnishee to answer any question calculated to elicit facts not previously disclosed, and which may tend to charge him,⁸³ although the answer may require the garnishee to make a statement of his accounts with the defendant,⁸⁴ or subject the garnishee, or render him liable to per-

⁸¹ *Henwood v. American Legion of Honor*, 2 Pa. Dist. R. 170. See, also, ante, § 292.

* See ante, §§ 290-292.

⁸² *Mack v. Brown*, 20 Mich. 335; *Botsford v. Simmons*, 32 Mich. 352.

† *Bean v. Barney*, 10 Iowa, 498; *Cordes v. Kauffman*, 29 Tex. 180. Contra, *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 South. 589.

⁸³ *Crossman v. Crossman*, 38 Mass. 21; *Nutter v. Framingham & L. R. Co.*, 131 Mass. 231; *Goulding v. Hair*, 133 Mass. 78; *Mansfield v. New England Exp. Co.*, 58 Me. 35; *Oberteuffer v. Harwood*, 2 McCrary, 415, 6 Fed. 828. Compare *Baxter v. Missouri, K. & T. Ry. Co.*, 67 Barb. (N. Y.) 283.

⁸⁴ *Roquest v. The B. E. Clark*, 13 La. Ann. 210.

sonal pecuniary loss or obligation,⁸⁵ or show that he has been a party to a fraudulent conveyance.⁸⁶ When the cause is appealed, and tried de novo upon appeal, the plaintiff may further examine the garnishee.⁸⁷ The length to which the examination may be extended is governed by the sound discretion of the court trying the case, at least to a great extent,⁸⁸ but should not be limited to such an extent as to render the remedy ineffectual.⁸⁹

Amending, Supplementing, Modifying, and Contradicting the Disclosure.

Should be Liberally Allowed to Prevent Injustice.

§ 309. Justice requires that, whenever, at any stage of the proceedings before ultimate judgment, it is discovered that any fact has been stated incorrectly, or in terms so imperfect as to admit of an inference or an implication not intended, or that, through inadvertence or misapprehension, material facts have been wholly omitted in previous statements, opportunity should be

⁸⁵ Devoll v. Brownell, 5 Pick. (Mass.) 448; Neally v. Ambrose, 21 Pick. (Mass.) 185. Compare Bull v. Loveland, 10 Pick. (Mass.) 9.

⁸⁶ Neally v. Ambrose, 21 Pick. (Mass.) 185; Lamb v. Stone, 11 Pick. (Mass.) 527; Oberteuffer v. Harwood, 2 McCrary, 415, 6 Fed. 828; St. Louis Brokerage Co. v. Cronin, 14 Mo. App. 586. But see Kearney v. Nixon, 19 La. Ann. 16; Battles v. Simmons, 21 La. Ann. 416.

⁸⁷ Oliver v. Chicago & A. Ry. Co., 17 Ill. 587; Newell v. Blair, 7 Mich. 103; Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613; Barber v. Howd, 85 Mich. 221, 48 N. W. 539.

⁸⁸ Warner v. Perkins, 8 Cush. (Mass.) 518; Worthington v. Jones, 23 Vt. 546; Knapp v. Levanway, 27 Vt. 293.

⁸⁹ Pickler v. Rainey, 4 Heisk. (Tenn.) 335; Devries v. Buchanan, 10 Md. 210.

afforded for any further disclosures which are indispensable to correct or prevent the occurrence of errors;⁹⁰ and technical defects may be amended whenever the answer is excepted to because of them.⁹¹

⁹⁰ *Collins v. Smith*, 12 Gray (Mass.) 431; *Winsted Bank v. Adams*, 97 Mass. 110; *Carrique v. Sidebottom*, 3 Metc. (Mass.) 298; *Barber v. Howd*, 85 Mich. 221, 48 N. W. 539; *Wing v. Nutter*, 17 N. H. 256; *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418; *Cross v. Brown* (R. I.) 33 Atl. 147, 158.

ON APPEAL: The case having been taken to the circuit court by appeal, the garnishee may there amend or supplement the disclosure made by him in justice court. *Newell v. Blair*, 7 Mich. 103; *Lehman v. Hudman*, 85 Ala. 135, 4 South. 741; *Compare Buford v. Welborn*, 6 Ala. 818; *Taylor v. Kain*, 8 Baxt. (Tenn.) 35.

ON SCIRE FACIAS: In response to summons to show cause why judgment should not be rendered against him on his answer, garnishee may show matters of hearsay by supplemental disclosure. *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. 70.

He may amend after judgment declaring his previous answer defective and insufficient. *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. 719; *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. 719; *Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards* (Tex. Civ. App.) 29 S. W. 418.

Held, that he cannot insist upon his right to make further answer pending the decision of the court upon his refusal to answer. *American Button Hole, Overseaming & Sewing Mach. Co. v. Burgess*, 75 Me. 52.

ON THE TRIAL, he has the undoubted right to correct any mistakes made in his examination before the commissioner. *Klauber v. Wright*, 52 Wis. 303, 8 N. W. 893.

AFTER REVERSAL OF JUDGMENT discharging the garnishee, held, that he could file an amended answer showing that, before writ of error was sent out, and after judgment discharging him, he had paid his debt to principal defendant. *Webb v. Miller*, 24 Miss. 638, 57 Am. Dec. 189.

DISPUTING THE RECORDS: He may show that the minutes of his disclosure which he has signed and sworn to before the justice

⁹¹ *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. 719; *Burrus v. Moore*, 63 Ga. 405, 409.

Answer not Amendable of Course, but by Permission.

§ 310. Ordinarily, the garnishee's amended and additional answers are put in under the authority of the court. His right is not absolute to make new and additional statements at any and every possible point in the course of proceedings in the cause. His right ceases after filing his general answer, and replying in detail to interrogatories propounded to him, unless, in the exercise of the judicial discretion, he is permitted to make some addition to supply deficiencies through which, without it, irreparable injury might be incurred.⁹² Such discretion ought always to be used with

are not correct minutes of what he disclosed; and refusal to allow such evidence is error. The minutes are not such public records as import absolute verity. *Sutherland v. Burrill*, 82 Mich. 13, 17, 45 N. W. 1122.

⁹² *Collins v. Smith*, 12 Gray (Mass.) 431; *Crerar v. Milwaukee & St. P. Ry. Co.*, 35 Wis. 67; *Smith v. Brown*, 5 Cal. 118; *Stedman v. Vickery*, 42 Me. 132; *Bell v. Strow*, 59 Mo. 118; *Soule v. Kennebec Ice Co.*, 85 Me. 166, 27 Atl. 92; *Butler v. Wendell*, 57 Mich. 62, 68, 23 N. W. 460; *How. Ann. St. Mich.* § 8071; *Milliken v. Mannheimer*, 49 Minn. 521, 52 N. W. 139; *Stockton v. City of Burlington*, 4 G. Greene (Iowa) 84.

The only objection which could arise to allowing the garnishee to amend his answer is that he might be induced, by new suggestions and new views, to put in an answer, varying from his first answer, and not true in itself. But, when it is considered that, by any mode of administering the law, the garnishee may take his own time and his own counsel, and make such answer as he will, there seems to be no more danger of falsification in the one case than in the other. *Hovey v. Crane*, 12 Pick. (Mass.) 167.

The discretion to allow amendments ought to be liberally exercised, when the disclosure was made without aid of counsel. *Allen v. Hazen*, 26 Mich. 142.

The garnishee should move to amend as soon as he discovers the need of it. *John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 84 Wis. 1, 54 N. W. 108.

discrimination and care; and it may safely be presumed that such permission will never be given when there is reason to apprehend that, if granted, it would be the means of working injustice.⁹³

Some Amendments of Course, and Some of Right.

§ 311. Ordinarily, therefore, the garnishee may amend his disclosure only on permission obtained from the court; but there are some matters, such as correcting the verification to the answer, which may be made of course.⁹⁴ In some cases the garnishee, very probably, has an absolute right to amend his answer, and for the refusal of the court to allow it to be done may assign error, and have the judgment against him reversed upon appeal.⁹⁵ A garnishee who has answered admitting liability, and afterwards learns that others claim the property or debt which he had supposed to belong to the defendant, and concerning which he has

⁹³ Collins v. Smith, 12 Gray (Mass.) 431.

AMENDING EVASIVE ANSWERS: A garnishee who has filed an answer clearly evasive ought not to be permitted to amend, as such a practice might lead to frivolous delays. Davis v. Oakford, 11 La. Ann. 379; Tapp v. Green, 22 La. Ann. 42.

Great abuse might be practiced if too liberal indulgence were permitted in this respect. Neilson v. Scott, 1 Rice, Dig. (S. C.) 80.

The garnishee, having had ample opportunity to disclose facts material to his defense, and having willfully or negligently refused to do so, ought not to be allowed to amend so that his answer would entitle him to be discharged. Thomas v. Fuller, 26 La. Ann. 625; Pickler v. Rainey, 4 Heisk. (Tenn.) 335; Conner v. Allen, 3 Head (Tenn.) 418.

A garnishee cannot be allowed to surprise the plaintiff by showing, on the trial, what he might have put in by amended answer long before. John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee, 84 Wis. 1, 54 N. W. 108.

⁹⁴ Burrus v. Moore, 63 Ga. 405.

⁹⁵ Alamo Ice Co. v. Yancey, 66 Tex. 187, 18 S. W. 499.

disclosed, has a right to bring such newly-discovered matter to the attention of the court by an amended or supplemental answer, and demand that such claimants be made parties to the suit, or that he be discharged.⁹⁶ When the garnishee files an amended answer, the plaintiff is entitled to an opportunity to examine him further.⁹⁷

The Construction and Effect to be Given to the Garnishee's Answer.

Equivocal Statements—Language not Distorted.

§ 312. The rule that doubtful statements are to be taken most strongly against the party making them has been applied to the disclosure of the garnishee;⁹⁸ but his language is not to be distorted or forced into any unnatural construction, nor can inferences be drawn from any real or supposed discrepancies in his answer, against the fair and natural import of the lan-

⁹⁶ *Alamo Ice Co. v. Yancey*, 66 Tex. 187, 18 S. W. 499; *Tracy v. McGarty*, 12 R. I. 168; *Lewis v. Dunlop*, 57 Miss. 130; *Fowler v. Williamson*, 52 Ala. 16; *Batchellor v. Richardson*, 17 Or. 334, 21 Pac. 392.

⁹⁷ *Hovey v. Crane*, 12 Pick. (Mass.) 167.

⁹⁸ *Sebor v. Armstrong*, 4 Mass. 206; *Cleveland v. Clap*, 5 Mass. 201; *Graves v. Walker*, 21 Pick. (Mass.) 160; *Sampson v. Hyde*, 16 N. H. 492; *Whitney v. Kelly*, 67 Me. 377; *Williams v. Housel*, 2 Iowa, 154; *Bebb v. Preston*, 3 Iowa, 325; *Ormsbee v. Davis*, 5 R. I. 442; *Brainard v. Shannon*, 60 Me. 342; *McCoy v. Williams*, 6 Ill. 584.

EVASION: Especially is this true of evasive answers and statements. *Barker v. Osborne*, 71 Me. 69; *Crain v. Gould*, 46 Ill. 293; *Keel v. Ogden*, 5 T. B. Mon. (Ky.) 362; *Dawson v. Maria*, 15 Or. 556, 16 Pac. 413.

If a garnishee, who should have knowledge of the essential facts, makes a doubtful answer, no presumptions can be made in his favor. *Sebor v. Armstrong*, above.

guage taken all together,⁹⁹ and the original and further disclosure must be taken as one, and considered together.¹⁰⁰ A layman's language, in his disclosure, is to be taken in its ordinary meaning, and he is not supposed to be speaking in technical terms.¹⁰¹ The answer of the garnishee appearing to be as certain and positive as his knowledge will permit, he cannot be charged, unless his liability appears.¹⁰² But, where the circumstances excite strong suspicion of fraud,

⁹⁹ *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Scott v. Ray*, 18 Pick. (Mass.) 360; *Giddings v. Coleman*, 12 N. H. 153; *Sampson v. Hyde*, 16 N. H. 492; *First Nat. Bank of Montague v. Robertson* (Tex. Sup.) 19 S. W. 1069; *Id.*, 3 Tex. Civ. App. 150, 22 S. W. 100; *U. S. v. Langton*, 5 Mason, 280, Fed. Cas. No. 15,560.

The garnishee's disclosure must be construed as a whole, and no part can be disregarded in construing the rest. *Sexton v. Amos*, 39 Mich. 696.

In arriving at the facts, the plain and natural import of the language of the answer taken together must control, and the garnishee must be charged, or not, according as the evidence afforded by the whole answer preponderates. *Cardany v. New England Furniture Co.*, 107 Mass. 116.

¹⁰⁰ *Meadowcroft v. Agnew*, 89 Ill. 469; *Sexton v. Amos*, 39 Mich. 696; *Easton v. Lowery*, 29 Ala. 454.

¹⁰¹ *Case v. Dewey*, 55 Mich. 116, 20 N. W. 817.

¹⁰² *Ormsby v. Anson*, 21 Me. 23; *Harris v. Aiken*, 3 Pick. (Mass.) 1; *Wilhelmi v. Haffner*, 52 Ill. 222; *Hart v. Dahlgreen*, 16 La. 559; *Rice v. Whitney*, 12 Ohio St. 358.

LIABILITY NOT PRESUMED, BUT MUST BE PROVED: In Massachusetts, where the garnishee is called "trustee," *Parsons, C. J.*, in an early case (*Webster v. Gage*, 2 Mass. 503), used the following language, in delivering the opinion of the court: "As the trustees must be holden, unless sufficient matter appears in their answer to discharge them," etc. While this remark might be considered as proper when applied to the particular facts of that case, the language is unfortunate; and from this dictum a misconception of the law arose, and was maintained in that state for many years, until, in

and the garnishee has knowledge of facts which would discharge him if he were innocent, but gives only an indefinite and evasive answer, it will be presumed

the case of *Porter v. Stevens*, 9 Cush. (Mass.) 530, Cushing, J., in an elaborate and well-considered opinion, traces the origin of the error, and, after reviewing several cases (*Cleveland v. Clap*, 5 Mass. 201; *Ripley v. Severance*, 6 Pick. [Mass.] 474; *Kelly v. Bowman*, 12 Pick. [Mass.] 383; *Patterson v. Buckminster*, 14 Mass. 141; *Graves v. Walker*, 21 Pick. [Mass.] 100, 162, and *Shaw v. Bunker*, 2 Metc. [Mass.] 376) generally supposed to recognize as law the dictum above quoted, proceeds as follows: "A scrutiny of other cases cited by counsel, to the effect that the answers of a trustee, being his own language, in all doubtful cases will be construed most strongly against himself, leads to a similar conclusion, namely, that the court, in these cases, was commenting on the matter of answers in discharge, or evidence of a possession of credits ascertained or admitted by previous answers, and on account of which the burden of proof and of logical conclusion was in a manner shifted, and the question necessarily became how to discharge, not to charge, the trustee. * * * Whether the alleged trustee has in his hands and possession the goods, effects, or credits of the plaintiff's debtor, thus intrusted or deposited, is a question of fact, on the pleadings, to be tried and ascertained as other matters of fact are ascertained by the exhibition of proofs, and these proofs are governed by the established principles of legal reasoning, which are, after all, but the principles of pure universal reason, elicited from the conflict of opposing minds, tested by judicial experience and impartiality, and adapted to the changeful interests of human life. Now, according to these well-established principles of reasoning, and of legal proof, the allegation of the plaintiff's writ, that the party summoned is the trustee of the plaintiff's debtor, is an allegation merely. It is not of itself evidence, either conclusive or even *prima facie*. The party summoned, it is true, may admit the allegation, either expressly or by making default; and then the proof consists of his admission. But, if the alleged trustee deny the allegation, as he may, then the plaintiff is put to the proof of his allegation. 'Affirmantis est probare.' * * * It is for the plaintiff to prove his allegation, not for the defendant trustee to disprove it." Cited and approved in *Cardany v. New England Furniture Co.*, 107 Mass. 116. See, also, *Lane v. Felt*, 7 Gray (Mass.) 491.

that he could not make any showing more favorable to himself.¹⁰³

Statements of Fact and Conclusions of Law—Presumption of Truth.

§ 313. The facts stated by the garnishee in his answer, and not his conclusions, govern in determining his liability. If he makes a general denial of all and any liability, and then proceeds to state, or his further examination discloses, the facts in detail, he will be charged, if the facts disclosed warrant it, regardless of his denial of liability.¹⁰⁴ It is unnecessary to controvert the answer in such cases.* A disclosure not contradicted, and upon which issue has not been taken, is presumed to be absolutely true;¹⁰⁵ and this presumption of truth extends to matters stated upon in-

¹⁰³ Page v. Smith, 25 Me. 256; Sebor v. Armstrong, 4 Mass. 206. See, also, Hart v. Dahlgreen, 16 La. 559.

¹⁰⁴ Donnelly v. O'Connor, 22 Minn. 309; Farmers' & Mechanics' Bank v. Welles, 23 Minn. 475; Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139; Hitchcock v. Watson, 18 Ill. 289; Everdell v. Sheboygan & Fond du Lac Ry. Co., 41 Wis. 395, 402; Grever v. Culver, 84 Wis. 295, 54 N. W. 585; Bebb v. Preston, 1 Iowa, 460; Cornish v. Russell, 32 Neb. 397, 48 N. W. 379; Baker v. Moody, 1 Ala. 315; Mann v. Buford, 3 Ala. 312, 37 Am. Dec. 691; White v. Kahn (Ala.) 15 South. 595; Mason v. Beebee, 44 Fed. 556; Pickler v. Rainey, 4 Heisk. (Tenn.) 335; Ordway v. Remington, 12 R. I. 319.

The garnishee's conclusions concerning the facts disclosed by him are subject to revision by the court. Lamb v. Franklin Manuf'g Co., 18 Me. 187; Plummer v. Rundlett, 42 Me. 365.

* Moursund v. Preiss, 84 Tex. 554, 19 S. W. 775; Swearingen v. Wilson, 2 Tex. Civ. App. 157, 21 S. W. 74.

¹⁰⁵ Davis v. Pawlette, 3 Wis. 300, 42 Am. Dec. 690; Vanderhoof v. Holloway, 41 Minn. 498, 43 N. W. 331; Meeker v. Sanders, 6 Iowa, 61; Bean v. Barney, 10 Iowa, 498; Robinson v. Rapelye, 2 Stew. (Ala.) 86; Hurst v. Home Protection Fire Ins. Co., 81 Ala. 174, 1 South. 209; White v. Kahn (Ala.) 15 South. 595; White v. Hobart, 90 Ala. 368, 7 South. 807; Hamilton v. Hill, 86 Me. 137, 29 Atl. 956; Williams v. Jones, 42 Miss. 270; Davis v. Knapp, 8 Mo. 657; Truitt v. Griffin, 61

formation and belief, as well as to matters positively asserted.¹⁰⁶

Liability must Clearly Appear, or Garnishee will be Discharged.

§ 314. When the plaintiff contents himself with the showing made by the garnishee's disclosure, and rests his case upon it, it must be clear and distinct in its admissions and statements, upon which recovery depends, to warrant charging the garnishee.¹⁰⁷ If the garnishee discloses that he does not know to whom he is indebted, or to whom the property in his possession

Ill. 26; McCoy v. Williams, 6 Ill. 584; Rankin v. Simonds, 27 Ill. 352; Illinois Cent. Ry. Co. v. Cobb, 48 Ill. 402.

As to the effect of the disclosure when controverted, see ante, §§ 287-289, and post, § 369.

This rule extends to answers made to the summons to show cause. Varian v. New England Mut. Acc. Ass'n, 156 Mass. 1, 30 N. E. 368.

Under some statutes, the plaintiff is not allowed to contradict the disclosure, and, of course, under these statutes the answer is conclusive so far as it goes. See ante, § 180; Comstock v. Farnum, 2 Mass. 96; Stackpole v. Newman, 4 Mass. 85; Gouch v. Tolman, 10 Cush. 104; Cheatham v. Trotter, Peck (Tenn.) 198; Childress v. Dickins, 8 Yerg. (Tenn.) 113.

¹⁰⁶ See ante, § 303.

¹⁰⁷ Weirich v. Scribner, 44 Mich. 73, 6 N. W. 91; Smith v. Heland, 81 Mich. 471, 45 N. W. 1017; Banning v. Sibley, 3 Minn. 389 (Gil. 282, 293); Schafer v. Vizona, 30 Minn. 387, 15 N. W. 675; Vanderhoof v. Halloway, 41 Minn. 498, 43 N. W. 331; Wilder v. Ferguson, 42 Minn. 112, 43 N. W. 794; People v. Johnson, 14 Ill. 342; Cairo & St. L. Ry. Co. v. Killenberg, 82 Ill. 295; Meadowcroft v. Agnew, 89 Ill. 469; Cairo & St. L. Ry. Co. v. Hindman, 85 Ill. 521; Johann v. Rufener, 30 Wis. 671; Mason v. Beebee, 44 Fed. 556; Richards v. Stephenson, 99 Mass. 311; Seward v. Arms, 145 Mass. 195, 13 N. E. 487; Wilder v. Shea, 13 Bush (Ky.) 128; Smith v. Clarke, 9 Iowa, 241; Morse v. Marshall, 22 Iowa, 290; Church v. Simpson, 25 Iowa, 408; Hibbard v. Everett, 65 Iowa, 372, 21 N. W. 683; Brainard v. Simmons, 67 Iowa, 646, 21 N. W. 27, and 25 N. W. 844; Drake, Attachm. § 659.

A disclosure showing an indebtedness is sufficient, though it does
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belongs,¹⁰⁸ or whether it is subject to be reached by garnishment process,¹⁰⁹ or the disclosure leaves it in doubt whether he is indebted to the defendant or some one else,¹¹⁰ the plaintiff must fail, and the garnishee be discharged, unless the necessary facts are proven aliunde. For example, if the garnishee discloses that he is indebted, but other persons than the defendant

not show the debt to be due. *Hobson v. Kelly*, 87 Mich. 187, 49 N. W. 533.

There being several defendants in the principal suit, and only one having been personally served, a disclosure made by the garnishee summoned in such suit, admitting indebtedness, will be presumed to be an indebtedness to the defendant served. *Hinkley v. St. Anthony Water Power Co.*, 9 Minn. 55 (Gil. 44).

A disclosure that money due is for commissions for sales does not show that the same is to a broker, and therefore not exempt as wages, and a judgment on it is erroneous. *Hamberger v. Marcus*, 157 Pa. St. 133, 27 Atl. 681.

A disclosure which sets out the giving of a warranty deed of land by the garnishee to the principal defendant, for a consideration named, and the dispossession of the principal defendant by legal proceedings by one showing paramount title in himself, is sufficient to render the garnishee liable for the amount of the consideration money. *Allen v. Hazen*, 26 Mich. 142.

¹⁰⁸ *Walker v. Detroit, G. H. & M. Ry. Co.*, 49 Mich. 446, 13 N. W. 812; *Lyon v. Kneeland*, 58 Mich. 570, 25 N. W. 518; *Karp v. Citizens' Nat. Bank of Saginaw*, 76 Mich. 679, 43 N. W. 680; *Townsend v. Cass Circuit Judge*, 39 Mich. 407; *Weil v. Tyler*, 38 Mo. 545.

When a bank summoned as garnishee disclosed that it had a deposit on its books in the name of the defendant as agent, and that it knew no principal, and that no one else had claimed the money before the garnishment or since, it was held that the garnishee was properly charged. *Proctor v. Greene*, 14 R. I. 42.

¹⁰⁹ *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 652, 57 N. W. 1050.

¹¹⁰ *Spears v. Chapman*, 43 Mich. 541, 5 N. W. 1038; *Pioneer Printing Co. v. Sanborn*, 3 Minn. 413 (Gil. 304); *Hewitt v. Wagar Lumber Co.*, 38 Mich. 701; *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Morse v. Marshall*, 22 Iowa, 290.

claim to own the debt, he must be discharged, unless such claimants are made parties, and their rights litigated.¹¹¹ A disclosure absolutely denying liability cannot be overcome by ambiguous and inferential testimony alone, so as to send the case to the jury.¹¹² But, when the garnishee assumes the risk, after he is served, of paying to a claimant, he must, upon the trial, prove that the claimant's right was paramount and bona fide.¹¹³

When Disclosure Shows Prima Facie Liability.

§ 315. There are numerous cases holding that, when the garnishee by his disclosure shows a prima facie liability, and attempts to avoid it by showing that it has been discharged, or the like, he must be charged, unless he discloses facts which enable the court to say judicially that he should be discharged.¹¹⁴

¹¹¹ Button v. Trader, 75 Mich. 295, 42 N. W. 834; Mansfield v. Stevens, 31 Minn. 40, 16 N. W. 455. But see Wentworth v. Weymouth, 11 Me. 446; Wood v. Partridge, 11 Mass. 488.

¹¹² Quinn v. Blanck, 55 Mich. 269, 21 N. W. 307.

¹¹³ Lyman v. Tarbell, 30 Vt. 463.

¹¹⁴ Webster v. Gage, 2 Mass. 503; Cleveland v. Clap, 5 Mass. 201; Graves v. Walker, 21 Pick. (Mass.) 160, 162; Shearer v. Handy, 22 Pick. (Mass.) 417; Rowell v. Felker, 54 Vt. 526; Toothaker v. Allen, 41 Me. 324; Butman v. Hobbs, 35 Me. 232, 237; Whitney v. Kelley, 67 Me. 377; Barker v. Osborne, 71 Me. 69; Fogg v. Worster, 49 N. H. 503; dissenting opinion in Dawson v. Iron Range & H. B. R. Co., 97 Mich. 33, 45, 56 N. W. 106; Maynards v. Cornwell, 3 Mich. 109; McCoy v. Williams, 6 Ill. 584; Crain v. Gould, 46 Ill. 293.

Statement, in a disclosure admitting an indebtedness to the defendant, that the defendant had served upon him written notice that he had assigned his interest in the debt before the garnishment, held too indefinite to relieve the garnishee from his admitted liability. Born v. Staaden, 24 Ill. 322; Compare Frank v. Frank, 6 Mo. App. 588.

A statement in the answer of the garnishee, that he is informed and believes that his debt to the defendant is exempt from garnishment,

In Massachusetts it was held, under this rule, that when it appears by the answer of the garnishee that, long before the service of the plaintiff's writ upon him, divers notes belonging to the defendant were deposited in his hands, it was incumbent upon him to show clearly that he had been discharged; that, if he left this doubtful, he must be charged, and no presumptions could be indulged in his favor.¹¹⁵ On the other hand, the supreme court of Michigan, in a similar case, held that it was incumbent upon the plaintiff to prove that the liability existed at the time the garnishment suit was instituted, saying that "whether a presumption [of continued liability] arises must, of necessity, depend upon the nature of the subject in question, as well as the circumstances of the transaction to which it is sought to be applied."¹¹⁶ So, too, there

is insufficient to discharge him, because issue upon it would put in issue only the fact of his belief. The exemption being in favor of residents only, he should also state that the defendant is a resident. *Smith v. Chicago & N. W. Ry. Co.*, 60 Iowa, 312, 14 N. W. 335.

The garnishee stated that he was not indebted to the defendant at the time he was summoned as garnishee, but that, before that time, he had delivered to them accommodation notes for a much larger amount, which were not yet due, and that he did not know whether the notes had been discounted or not. Held, that he was properly charged. *Milliken v. Mannheimer*, 49 Minn. 521, 52 N. W. 139.

¹¹⁵ *Ripley v. Severance*, 6 Pick. (Mass.) 474.

¹¹⁶ *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 88.

LIABILITY SHOWN PRESUMED TO CONTINUE: The disclosure of the garnishee showing that, "on the evening of the 7th, about the time of the service" of the garnishment summons, the garnishee was indebted, it will be presumed that the indebtedness existed at the time the summons was served. *Hoops v. Culbertson*, 17 Iowa, 305. Compare *Fleming v. Baxter*, 20 Colo. 238, 38 Pac. 57.

The disclosure showed \$600 balance on the garnishee's books due the defendant, but the garnishee said that, except by the books, he had no knowledge of whether he owed the defendant or not,—that the debt

are several decisions of the New England states to the effect that a garnishee who has admitted that he has in his possession property of, or owes a debt once belonging to, the defendant, will be charged, notwithstanding he also states that he is informed that the defendant sold his interest before the process was begun, or others claim to have purchased it.¹¹⁷ But it is well settled in most of the Western states that, in such a case, no recovery can be had against the garnishee unless the plaintiff brings in the alleged claimant, and disproves his title to the property.¹¹⁸ The same is true of the garnishee's statements that the property is exempt from garnishment. The plaintiff must disprove it.¹¹⁹ It is apprehended that the true rule is that, when a claimant is announced by the garnishee in his answer, whether that claimant be the principal defendant, claiming exemption, or some other party, the plaintiff, if he can recover at all, against the garnishee, without forming and trying an issue with the claimant, must assume the burden of proof throughout; and that, with this exception, the maxim, "*Afirmantis est probare*," universally applied in other

might have been discharged without his knowledge. Held, that he was properly discharged. *Hewitt v. Wagar Lumber Co.*, 38 Mich. 701.

¹¹⁷ *Wentworth v. Weymouth*, 11 Me. 446; *McAllister v. Brooks*, 22 Me. 80, 38 Am. Dec. 282; *Giddings v. Coleman*, 12 N. H. 153; *Wood v. Partridge*, 11 Mass. 488; *Born v. Staaden*, 24 Ill. 320.

Held, that a good assignment cannot be presumed when the garnishee expresses no opinion. *Born v. Staaden*, *supra*.

¹¹⁸ *Hewitt v. Wagar Lumber Co.*, 38 Mich. 701; *Sexton v. Amos*, 39 Mich. 697; *Smith v. Holland*, 81 Mich. 471, 45 N. W. 1017; *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700; *King v. Carhart*, 18 Ga. 650. See, also, *post*, § 333.

¹¹⁹ *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050. But see *Smith v. Chicago & N. W. Ry. Co.*, 60 Iowa, 312, 14 N. W. 335.

forms of action, is equally applicable in garnishment trials. No man should be asked to prove a negative.¹²⁰

¹²⁰ "The answer of the garnishee not only admits all the allegations of the complaint, except the indebtedness, but affirmatively alleges that, a short time before the service of garnishment, he purchased of the defendant in the action the lands and notes mentioned in the complaint, at the agreed and stipulated price of \$5,500, but alleges that he had wholly paid for the same prior to such time. The reply denied the allegation of payment, and thus raised the only issue of fact in the case. Upon this issue the burden of proof was clearly with the garnishee. The rule is well settled that, when a defendant admits a cause of action set out in the complaint, and relies upon the defense of payment, the burden of proof is upon him to establish that fact." *Willis v. Holmes* (Or.) 42 Pac. 989.

CHAPTER XIV.

SCIRE FACIAS, PAYMENT INTO COURT, DISSOLUTION BOND, AND CHANGE OF VENUE.

- § 316. Scire Facias, or Summons to Show Cause.
- 317. Payment of Garnished Property into Court.
- 318. Bond to Discharge the Garnishee and Release the Property
Garnished—Object and Construction of Statutes.
- 319. — Right to Release on Bond Statutory—Effect of Bond.
- 320. — Bond to Pay What Plaintiff may Recover in Main Action.
- 321. — Bond to Pay What might be Recovered of Garnishee.
- 322. — Construction of Bond.
- 323. — Defenses to Action on Bond.
- 324. — The Manner of Enforcing the Obligation.
- 325. Change of Venue.
- 326. — Garnishment not Separable from Main Action.
- 327. — Garnishment an Action Entitling Parties to Change.
- 328. — Who may Have Change of Venue, and When.

Scire Facias, or Summons to Show Cause.

§ 316. Under many of the statutes, no final judgment can be rendered against the garnishee until he has had an opportunity to show cause against it upon a second summons,¹ unless he waives such summons.²

¹ *Brackon v. Ballentine*, 16 N. J. Law, 484; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121; *Williams v. Van Metre*, 19 Ill. 293; *Toledo, W. & W. Ry. Co. v. Reynolds*, 72 Ill. 487; *Canan v. Carryell*, 1 N. J. Law, 3. See, also, post, §§ 354, 388.

In Iowa, summons to show cause is necessary only in default cases, and not in cases in which the garnishee refuses to answer, *Scamhorn v. Scott*, 42 Iowa, 529; or appears and then suffers default for not answering, *McDonald v. Finney*, 87 Iowa, 529, 54 N. W. 476.

On scire facias, the garnishee may make any defense available under the original summons. *Hogshead v. Carruth*, 5 Yerg. (Tenn.) 227.

See, also, post, § 391; *Varian v. New York Mut. Acc. Ass'n*, 156 Mass. 1, 30 N. E. 368.

² *Griffin v. Potter*, 27 Mich. 166; *Bigalow v. Barre*, 30 Mich. 1;

The office of this summons is to apprise the garnishee of the fact that a judgment has been recovered against the defendant, or that a conditional judgment has been rendered against himself, and that the plaintiff intends to look to him for payment; and its object is to give him an opportunity to show cause, if any there be, why he should not be required to pay.³ A summons not sufficiently intelligible to convey the required informa-

Barber v. Howd, 85 Mich. 221, 225, 48 N. W. 539; *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43; *Woodruff v. Bacon*, 34 Conn. 181.

Under How. Ann. St. Mich. § 8038, no summons to show cause is necessary when judgment is recovered against the defendant before the garnishee answers. *Elser v. Rommel*, 98 Mich. 74, 56 N. W. 1107.

When summons to show cause was issued and served, and on the return day neither party appeared, held, that the proceedings were at an end by force of the statute declaring the plaintiff nonsuited if he does not appear, and, therefore, that they could not be revived by a new summons, and a judgment thereon is no protection to the garnishee. *Johnson v. Dexter*, 38 Mich. 695.

³ *Cariker v. Anderson*, 27 Ill. 358; *Elser v. Rommel*, 98 Mich. 74, 56 N. W. 1107; *Brackon v. Ballentine*, 16 N. J. Law, 484.

OBJECT OF TWO WRITS: "In my judgment, the main object contemplated by the legislature in the first summons to the garnishee, which goes out with the attachment, was to bind the effects and property, if any such there might be, of the defendant, in the hands of the garnishee, and to prevent his making any disposition of them until it should be ascertained whether they would be needed to be applied in satisfaction of the plaintiff's claim; and that, until the garnishee is summoned by the scire facias, afterwards to be issued, he is not bound to presume that any appearance or answer will be required of him. * * * Unless he is called upon by the process of the court to make such answer, he has good right to believe, either that the plaintiff has been able to make his debt by some other means, or has become satisfied that he [the garnishee] is without funds or effects belonging to the defendant." *McCourtie v. Davis*, 2 Gilman (Ill.) 298, 304.

tion is nugatory;⁴ but, as the garnishee may waive this summons entirely, he may waive any defect in it.⁵ An appearance in answer to this summons will not waive defects in the previous proceedings, void for want of jurisdiction.⁶ If the former proceedings are without jurisdiction, the garnishee may safely ignore the scire facias.⁷ This summons is founded upon the previous proceedings,⁸ and is not an original writ.⁹ The plaintiff need file no petition under it.¹⁰ In order to confer jurisdiction upon the court to proceed further, it must be issued within the time prescribed by the statute, and comply with its terms,¹¹ and be regularly served.¹²

If the court acquires jurisdiction by the proceedings

⁴ Cariker v. Anderson, 27 Ill. 358; Neal v. Cook, 10 N. J. Law, 337; Welsh v. Blackwell, 14 N. J. Law, 344.

Improperly denominating the summons a scire facias is immaterial, if not misleading. Duncan v. Sangamo Fire Ins. Co., 35 Iowa, 20.

⁵ Woodruff v. Bacon, 34 Conn. 181.

⁶ Padden v. Moore, 58 Iowa, 703, 12 N. W. 724.

⁷ Illinois Cent. Ry. Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77.

⁸ Maynards v. Cornwell, 3 Mich. 309, 313.

Second summons is necessary when garnishee fails to answer. Longwell v. Hartwell, 164 Pa. St. 533, 30 Atl. 495.

⁹ Smyth v. Ripley, 32 Conn. 156.

"A scire facias, though not an original, but a judicial, writ, is properly an action, and in the nature of a new original." Castner v. Styer, 23 N. J. Law, 253.

¹⁰ Fifield v. Wood, 9 Iowa, 249. Contra, How. Ann. St. Mich. § 8037.

¹¹ Heritage v. Armstrong, 101 Mich. 85, 59 N. W. 439; Cariker v. Anderson, 27 Ill. 358. But see Dore v. Dougherty, 72 Cal. 232, 13 Pac. 621.

Held, that the statute directing that scire facias issue to the next succeeding term is merely directory, and the delay of a term is not fatal. Lomerson v. Hoffman, 24 N. J. Law, 674.

¹² First Nat. Bank of Detroit v. Burch, 76 Mich. 608, 43 N. W. 453.

What would be a sufficient service of the original summons is suf-

had, and the garnishee suffers judgment to go against him by default, errors and irregularities in the proceedings are thereby cured, and the judgment is as binding as if rendered after contested trial.¹³ When the length of the notice is not provided by the statute, reasonable notice is all that is necessary.¹⁴

Payment of Garnished Property into Court.

§ 317. Payment into court is payment to the clerk of the court,¹⁵ or other proper officer appointed for the purpose of receiving it. Statutes frequently provide that, under certain conditions, the garnishee may—and some of them direct that, in certain cases, under order of the court, he shall—pay or deliver the attached property into court, and that thereupon he shall be discharged from all further liability in respect thereof.¹⁶ It has been said that, where such statutes exist, the garnishee may be charged for the use of the prop-

ficient service of scire facias. *Flagg v. Platt*, 32 Conn. 216. It must be executed, like any other ordinary process, by personal service. Two *nihils* are not a service. *McCourtie v. Davis*, 2 Gilman (Ill.) 298; *Castner v. Styer*, 23 N. J. Law, 236; *Mayor, etc., of Jersey City v. Horton*, 38 N. J. Law, 88.

When the statute expressly provides that two *nihils* shall be deemed a service in such cases, the officer must use due diligence during the whole time allowed for service before he can return the writ "Not Found," and the second cannot issue till the first is returned. *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

Service on the garnishee's attorney held insufficient. *Carter v. Koshland*, 12 Or. 492, 8 Pac. 556.

¹³ *Young v. Delaware, L. & W. Ry. Co.*, 38 N. J. Law, 502.

¹⁴ *Langford v. Ottumwa W. P. Co.*, 53 Iowa, 415, 5 N. W. 574.

¹⁵ *Warren v. Matthews*, 96 Ala. 183, 11 South. 285.

¹⁶ *Warren v. Matthews*, 96 Ala. 183, 11 South. 285; *Myers v. Smith*, 29 Ohio St. 125; *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188; *Estey*

erty while the suit is pending against him, unless he pays it into court.¹⁷ Payment made pursuant to such statutes affords the garnishee as complete protection as if made under execution.¹⁸ But voluntarily paying the money into court, without complying with the requirements of the statute, will not discharge the garnishee's obligation.¹⁹ In some respects these statutes are a protection and accommodation to the garnishee, and some of them are made solely for his benefit;²⁰ but usually the benefit is principally to the plaintiff, for he may thus obtain an order restraining the gar-

v. Fuller Implement Co., 82 Iowa, 678, 47 N. W. 1025; Barber v. Howd, 85 Mich. 221, 48 N. W. 539; State v. Judge, 39 La. Ann. 622, 2 South. 425.

OPERATES AS PAYMENT ON JUDGMENT: If the sheriff, to whom the garnishee turned over the property, absconds, the loss falls on the plaintiff, not the defendant. In re Dawson, 110 N. Y. 114, 17 N. E. 668.

¹⁷ See ante, § 133.

But, in the absence of such a statute, it is at least doubtful whether the garnishee could thus relieve himself of any responsibility. Oriental Bank v. Tremont Ins. Co., 4 Metc. (Mass.) 10. Certainly, it would be the veriest gratuity on his part to make such payment. Lyman v. Orr, 26 Vt. 122.

As to when payment into court may safely be made, without an order of court directing it, see Phelps v. Town, 14 Mich. 374; Keith v. Smith, 1 Swan (Tenn.) 92; Estey v. Fuller Implement Co., 82 Iowa, 678, 47 N. W. 1025.

¹⁸ See ante, § 210; Johann v. Rufener, 30 Wis. 671; Somers v. Losey, 48 Mich. 294, 12 N. W. 188.

¹⁹ Button v. Trader, 75 Mich. 295, 42 N. W. 834.

The garnishee may discharge the judgment rendered against him by paying the amount of it into court for that purpose. Griffin v. Potter, 27 Mich. 166; Black, Judgm. § 986.

²⁰ Coda v. Thompson, 39 W. Va. 67, 19 S. E. 548; Roberts v. Landecker, 9 Cal. 266; Potter v. Griffin, 27 Mich. 166; Barber v. Howd, 85 Mich. 221, 48 N. W. 539; Randolph v. Heaslip, 11 Iowa, 37; Estey v. Fuller Implement Co., 82 Iowa, 678, 47 N. W. 1025.

nishee from removing the property, and requiring him to put it into the custody of the court, thus insuring its presence to satisfy any judgment he may recover in his suit.²¹ After the property is turned over to the court, the parties may litigate their respective interests in it to the same extent as if still in the possession of the garnishee.²² But, unless an order of the court is made requiring payment of the property into court, the garnishee has an absolute right to possession, and can be deprived of it only by taking it on execution issued on the judgment rendered against him;²³ and if such an order has been improperly allowed, he may have mandamus to vacate it.²⁴ The opinion has been expressed that, in all cases, the court has power to make an order directing the payment of the money into court, whether there be a statute expressly granting it or not.²⁵ But it is at least doubtful whether courts can, even by virtue of statute, compel a garnishee to

²¹ *Johann v. Rufener*, 32 Wis. 195, 198. And see *Smith v. Gower*, 8 Metc. (Ky.) 141.

ORDER—HOW ENFORCED: Held, that an order to the garnishee to pay the money into court can only be enforced by action. *Rice v. Whitney*, 12 Ohio St. 358. See, also, post, § 391.

²² *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451; *Edwards v. Cosgro*, 71 Iowa, 296, 32 N. W. 350.

²³ *Langdon v. Thompson*, 25 Minn. 509.

²⁴ *Townsend v. Cass* Circuit Judge, 39 Mich. 407.

²⁵ POWER WITHOUT STATUTE TO REQUIRE PAYMENT INTO COURT: *Orton v. Noonan*, 27 Wis. 572; *Germania Sav. Bank v. Peuser*, 40 La. Ann. 796, 5 South. 75. "I think that the court should, in all cases of this nature, and especially where it is made to appear that the money or property in the hands of the garnishee is in danger of being lost, or the debt becoming worthless against him, direct the payment or delivery of the same to the sheriff, or the clerk of the court, or other proper officer, by whom it may be safely kept and preserved for the benefit of the person immedi-

surrender property upon which he has a lien, unless his lien is discharged, or, for the protection of the rights of others, the necessity shall be apparent.²⁶

Bond to Discharge the Garnishee and Release the Property Garnished.

Object and Construction of Statutes.

§ 318. It is often provided by statute that the defendant—and, in some cases, any party interested—may secure the discharge of the garnishee and the release of the property garnished upon making and filing in the cause a bond, as therein prescribed, payable to the plaintiff in the suit;²⁷ and in some of the states

ately entitled thereto. This is an order which may properly be made in any case, and particularly where the principal defendant asks it. I think there can be no doubt about the power of the court in such cases, whether it be expressly granted by statute or not." *Orton v. Noonan*, *supra*. Compare *Coda v. Thompson*, 39 W. Va. 67, 19 S. W. 548.

When the plaintiff did not show that the garnishee was an improper person to be intrusted with the property, and did not show that he was insolvent, held, that he was not entitled to have the property put into the hands of a receiver. *Silverman v. Kuhn*, 53 Iowa, 436, 5 N. W. 523.

Held that, when the garnishee denied indebtedness, the court has no authority to order him to pay an alleged indebtedness into court, but should authorize plaintiff to institute an action against him. *Hartman v. Olovera*, 51 Cal. 501; *Brown v. Moore*, 61 Cal. 432.

Held, that the court can order the delivery of only such property as the garnishee admits he possesses. *Coombs v. Davis*, 2 Wash. T. 466, 7 Pac. 860; *Everton v. Parker*, 3 Wash. St. 331, 28 Pac. 536.

²⁶ *Smith v. Menominee Circuit Judge*, 53 Mich. 560, 19 N. W. 184; *Weed v. Mirick*, 62 Mich. 414, 29 N. W. 78; *Smith v. Clarke*, 9 Iowa, 241; *Cox v. Russell*, 44 Iowa, 556; *Coombs v. Davis*, 2 Wash. T. 466, 7 Pac. 860.

²⁷ *How. Ann. St. Mich.* § 8105; *Sanb. & B. St. Wis.* § 2771.

it has been held that the statutes authorizing the giving of a bond to release property attached by actual seizure are broad enough to cover the case of property attached by garnishment.²⁸ The object of the statute is to enable the party authorized to give it to supersede the proceedings by giving security to perform the judgment of the court, either as to the plaintiff's right to recover against the principal defendant,²⁹ or as to the liability of the garnishee.³⁰ These statutes are remedial, and should be liberally construed.³¹

Right to Release on Bond Statutory—Effect of Bond.

§ 319. The right to have the property garnished released upon giving a sufficient bond does not exist independent of statute, and can be exercised only by the party to whom the statute extends the privilege.³²

²⁸ Woodward v. Adams, 9 Iowa, 474; Lecesne v. Cottin, 10 Mart. (La.) 174. Contra, Heyward v. Phillips-Buttoff Manuf'g Co., 97 Ala. 533, 11 South. 837; Henry v. Gold Park Min. Co., 10 Fed. 11.

²⁹ Myers v. Smith, 29 Ohio St. 120.

³⁰ Sutro v. Bigelow, 31 Wis. 527.

³¹ Sutro v. Bigelow, 31 Wis. 527; Balkum v. Strauss, 100 Ala. 207, 14 South. 53.

A statute allowing release of property garnished in circuit court is sufficient to authorize release in the circuit court of property garnished in justice court, on the case being taken to the circuit court by appeal. Grosslight v. Crisup, 58 Mich. 531, 25 N. W. 505.

The statute applies, and the garnishee may be discharged on bond before or after judgment obtained. Balkum v. Reeves, 98 Ala. 460, 13 South. 524.

³² Kling v. Childs, 30 Minn. 366, 15 N. W. 673; Heyward v. Phillips-Buttoff Manuf'g Co., 97 Ala. 533, 11 South. 837.

Bond executed by one not authorized held invalid, both at common law and under the statute. Cummins v. Gray, 4 Stew. & P. (Ala.) 397; Sewall v. Franklin, 2 Port. (Ala.) 493.

Though the statute do not authorize the bond, it is nevertheless valid and enforceable. Rich v. Sowles, 65 Vt. 135, 26 Atl. 585.

But, on the other hand, the plaintiff can require no better security than is given him by statute, and the garnishee is absolutely discharged upon the filing of the appropriate bond, and no new bond can be required, upon the securities in the original becoming insolvent, unless the statute provides for it.³³ After filing the appropriate bond, the proceedings against the garnishee are at an end. No judgment can be rendered against him,³⁴ and, if he elects to consider the proceedings as still pending, and makes answer accordingly, the defendant may, upon motion, have an order entered discharging him.³⁵

Bond to Pay What Plaintiff may Recover in Main Action.

§ 320. What should be the condition of the bond for the discharge of the garnishee depends entirely upon the statute under which it is made. It is only upon filing a bond substantially complying with the terms and requirements of the statute that the garnishee is entitled to be discharged. The condition of the bond, under most statutes, must be to pay whatever judgment the plaintiff may recover in the principal suit.³⁶

³³ *Dudley v. Goodrich*, 16 How. Prac. 189; *Hartford Quarry Co. v. Pendleton*, 4 Abb. Prac. 460.

The garnishee having been discharged upon bond, the plaintiff had him summoned again, upon the sureties in the bond becoming insolvent, and the second garnishment was sustained. *Stewart v. Dobbs*, 39 Ga. 82.

³⁴ *Guilford v. Reeves* (Ala.) 15 South. 661; *Balkum v. Reeves*, 98 Ala. 460, 13 South. 524; *Balkum v. Strauss*, 100 Ala. 207, 14 South. 53; *Jarvis v. Mitchell*, 99 Mass. 530.

After bond is filed, no traverse of the answer is necessary. *Ware v. Laird*, 93 Ga. 342, 20 S. E. 635.

³⁵ *Myers v. Smith*, 29 Ohio St. 120.

³⁶ *Grosslight v. Crisup*, 58 Mich. 531, 25 N. W. 505; *Burt v. Wayne Circuit Judge*, 82 Mich. 251, 46 N. W. 380; *People v. Cameron*, 2

Bond to Pay What might be Recovered of Garnishee.

§ 321. Under some of the statutes, the bond for dissolution of the garnishment proceedings is conditioned to pay whatever judgment might be rendered against the garnishee, but for the giving of the bond.³⁷ Be-

Gilman (Ill.) 468; Myers v. Smith, 29 Ohio St. 120; Rich v. Sowles, 65 Vt. 135, 26 Atl. 585.

The liability of the bond is not affected by the fact that it incorrectly states the amount of the plaintiff's claim, it being conditioned to pay whatever judgment the plaintiff may recover. Everett v. Westmoreland, 92 Ga. 670, 19 S. E. 37.

In Massachusetts a claimant may obtain a release of the property on giving a bond to pay whatever judgment might be rendered against the garnishee; but a bond to release it, given by the defendant, must be conditioned to pay whatever judgment the plaintiff may recover against him in the principal suit. Atwood v. West Roxbury Co-operative Bank, 156 Mass. 166, 30 N. E. 558.

³⁷ City of Dallas v. Western Electric Co., 83 Tex. 243, 18 S. W. 552; Sutro v. Bigelow, 31 Wis. 527; Whitehead v. Patterson, 88 Ga. 748, 16 S. C. 66; Balkum v. Strauss, 100 Ala. 207, 14 South. 53; Guilford v. Reeves (Ala.) 15 South. 661; Rome R. Co. v. Richmond & D. R. Co., 60 Fed. 43.

BURDEN OF PROOF—ESTOPPEL—RECITALS: In an action on a dissolution bond, with condition as required by statute, "that, if the plaintiff recover judgment in the action, he [defendant] will pay such judgment, or an amount thereon equal to the value of the money, property, or effects so garnished," and reciting that the plaintiff had garnished the money, property, and effects of the defendant in the hands of the garnishee, the defendants are estopped to set up an assignment to them of such property, money, or effects before the garnishment was served; and the burden is upon them, and not upon the plaintiff, to show the nature, amount, and value of the property. If the obligors in the bond fail to identify the property garnished, and show the amount and value thereof, they must be held liable for the whole amount of the judgment obtained by the plaintiff against the defendant in the original action. Greengard v. Fretz (Minn.; decided Jan. 28, 1896) 65 N. W. 949.

APPEARANCE BOND: It was held, in an early case in Pennsylvania, that, on entrance of appearance bail by the defendant in

fore there can be any recovery on a bond given under such a statute, there must be a judgment disposing of the garnishment proceedings.³⁸ In analogy with these decisions it was held, in an action on a bond given by a stakeholder to a garnishee, when the garnishee turned the property over to him, that no recovery could be had against the bondsmen till the garnishment was disposed of, the condition of the bond being that the property should be held for whoever may prove to be entitled to it.³⁹

Construction of Bond.

§ 322. A bond is sufficient if substantially complying with the requirements of the statute.⁴⁰ When the statute only required a bond conditioned to pay whatever judgment might be recovered against the garnishee, and a bond was nevertheless executed with condition to pay whatever judgment the plaintiff might recover in the main action, it was held that recovery could be had on it only for the amount for which the

foreign attachment, the plaintiff's lien on the property in the hands of the garnishee was dissolved. *Jackson's Appeal*, 2 Grant, Cas. (Pa.) 407.

EXEMPTION NOT WAIVED: The defendant does not waive his exemption by executing a bond to the plaintiff for whatever judgment might be recovered against the garnishee. *Born v. Williams*, 81 Ga. 796, 7 S. E. 868.

³⁸ *Whitehead v. Patterson*, 88 Ga. 748, 16 S. E. 66; *Guilford v. Reeves* (Ala.) 15 South. 661; *Cunningham v. Hogan*, 136 Mass. 407; *Porter v. Giles*, 129 Mass. 589.

COSTS: A garnishee who answers, after bond given, under such a statute, is entitled to the costs of making answer. *Rome R. Co. v. Richmond & D. R. Co.*, 60 Fed. 43.

³⁹ *Noble v. Bowman*, 35 Kan. 15, 10 Pac. 143.

⁴⁰ *Ware v. Laird*, 93 Ga. 342, 20 S. E. 635.

garnishee was chargeable.⁴¹ Of course, the surety on the bond can be held to no greater or different liability than he has assumed in his undertaking;⁴² but to that extent he is liable. If the bond is conditioned to pay any judgment that the plaintiff might recover against the defendant, it is no defense that the plaintiff could not have recovered against the garnishee,⁴³ nor that the person executing the bond did not understand either its condition or legal effect correctly.⁴⁴ In construing the bond, regard must be given to the understanding of the parties when they executed it, and the purpose of the statute in requiring it; and, when the bond is to take the place of the plaintiff's rights acquired by the garnishment proceeding, the surety cannot escape liability on his bond on the ground that the suit was discontinued as to one person who was a defendant when the bond was executed, and, therefore, that no judgment has been recovered against the defendants named in his bond, provided the fact of discontinuing as to such defendants would not have prevented the plaintiff from recovering against the garnishee.⁴⁵

⁴¹ *Farmers' Co-operative Manuf'g Co. v. Middle Georgia Manuf'g & Imp. Co.*, 94 Ga. 673, 20 S. E. 117. But see *Rich v. Sowles*, 65 Vt. 135, 26 Atl. 585.

⁴² RECITALS: The bond, being to pay whatever judgment the plaintiff may recover in the principal suit, is not limited by an understatement of the amount of the plaintiff's claim in one of its recitals. *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. 37.

⁴³ *Rich v. Sowles*, 65 Vt. 135, 26 Atl. 585.

⁴⁴ *Nevin v. Fouche*, 77 Ga. 47.

⁴⁵ *Sutro v. Bigelow*, 31 Wis. 527; *Rich v. Sowles*, 65 Vt. 135, 26 Atl. 585.

In a somewhat similar case on an attachment bond in Michigan, it was held that the plaintiff could not recover on the bond, regard-

Defenses to Action on Bond.

§ 323. When it is sought to charge a surety on his obligation, he cannot object that the statute allowing the release of the garnishee, on giving bond, does not provide any manner in which the surety can contest his liability. He is held to nothing but an obligation which he has voluntarily assumed, and, if he has neglected to secure, by contract with his principal, the right to intervene in the suit, and make any defense he sees fit, it is his own fault.⁴⁶

Manner of Enforcing Obligation.

§ 324. The manner of enforcing the obligation of the bond is governed largely by statute. Unless the statute provides a more expeditious remedy, the plaintiff must sue upon his bond, and show that it has been forfeited.⁴⁷ In Michigan, the proper practice, under the statute, is to have judgment entered up against the defendant alone, and thereupon make an application

less of the defendant against whom judgment was rendered having any interest in the attached property, when the discontinuance as to the other defendants was without the consent of the surety on the bond, or notice to him. *Andre v. Fitzhugh*, 18 Mich. 93.

The terms of the attachment bond held broad enough to charge the surety upon a judgment recovered against one of the attachment defendants. *Leonard v. Speidel*, 104 Mass. 356.

Discharge of one of the defendants, and summoning another, and then recovering judgment, was held to discharge the surety. *Tucker v. White*, 5 Allen (Mass.) 322; *Richards v. Storer*, 114 Mass. 101.

Change in the identity of the plaintiffs was held to have the same effect. *Quillen v. Arnold*, 12 Nev. 234.

⁴⁶ *Loh v. Judge of Wayne Circuit*, 26 Mich. 186.

⁴⁷ In suing on the bond it was held that setting out the bond in full in the declaration is a sufficient allegation of its execution by the person purporting to have signed it. *Sutro v. Bigelow*, 31 Wis. 527.

to the court for an order that execution on such judgment be issued against the sureties on the bond, as well as against the principal defendant.⁴⁸ Under the Georgia statute, it is held that "judgment cannot be entered on the bond until a prior judgment has been entered against the defendant in the suit. Judgment in the suit should be against the defendant alone; and, when it has been entered against him, the plaintiff may enter up judgment on the bond, also, against him and his security. The judgment in the suit is the foundation on which the judgment on the bond is predicated, and until there is a judgment in the suit there is no basis on which to enter one on the bond."⁴⁹

Change of Venue.

§ 325. How far do the old English practice of allowing causes to be transferred from one court to another for trial in certain cases, and the modern American statutes adopting and regulating the same, apply to garnishment proceedings and suits having garnish-

In a case in which the garnishee answered, disclosing an indebtedness, that the same was claimed by a stranger to the suit, and at this stage of the proceedings the garnishee was dismissed, upon bond conditioned to pay whatever judgment the plaintiff might have recovered against the garnishee, held that, though no proceedings could thereafter be had against the garnishee, the plaintiff could not recover upon the bond without showing that he could have recovered against the garnishee, and, therefore, that he had summoned the claimant, and had his claim adjudged against him. *Guilford v. Reeves* (Ala.) 15 South. 661. Compare *Cunningham v. Hogan*, 136 Mass. 407. See, also, ante, § 321.

⁴⁸ *Loh v. Judge of Wayne Circuit*, 26 Mich. 186.

⁴⁹ *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. 37.

ments auxiliary to them?⁵⁰ Does a transfer of the principal case or the garnishment proceeding take the other with it? These and other important and interesting questions, relating to change of venue in such cases, are liable to arise in practice at any time; but the decisions on the subject are so few, and so far from uniformity, that we can do little more than to collate the cases and refer the reader to them.

Garnishment not Separable From Main Action.

§ 326. As we have already seen, the garnishment suit is ancillary to the principal suit, and must be brought in the same court with it.⁵¹ This has been argued as a reason for holding that they cannot be separated, but must both continue in the same court.⁵² In so holding, and in holding that a statute requiring that actions brought in a county where the defendant does not reside be transferred to the county of his residence does not apply to garnishment proceedings, the supreme court of Iowa said: "It is not usual, if it ever is the case, for a mere auxiliary proceeding to be prosecuted in a court other than the one wherein the main action is pending. It would not be permitted, in the absence of express statutory requirement. There is no such statute in this state."⁵³ A Wisconsin statute expressly provides that a transfer or removal of one

⁵⁰ As to the origin of change of venue, see page 1046, pt. 2, 1 Smith, Lead. Cas. (8th Am. Ed.) Hare & Wallace's notes to *Mostyn v. Fabrygas*.

⁵¹ See ante, § 2.

⁵² *Pratt v. Albright*, 9 Fed. 634; *Poole v. Thatcherdeft*, 19 Fed. 49; *Weeks v. Billings*, 55 N. H. 371; *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160.

⁵³ *Miller & Co. v. Mason & Co.*, 51 Iowa, 239, 1 N. W. 483. See, (410)

shall take the other with it.⁵⁴ In an early case in Iowa it was held that the garnishee, having been duly summoned, and having answered denying liability, must be considered to have notice of everything done in the case till his answer is disposed of; and the plaintiff, having taken a change of venue in the principal case, and in the court to which the case was taken claimed issue on the answer of the garnishee, and upon failure of the garnishee to contest it recovered judgment, it was held that the garnishee could not have the judgment set aside, on the ground that he had no notice of the change of venue, or the contesting of his answer.⁵⁵ Afterwards a statute was enacted in that state to the effect that, if less than all the plaintiffs or defendants take a change, then, as to those who take no change, the cause shall proceed as if none had been taken; and it was held, under this statute, that change of venue in the main action, taken on application of the principal defendant, did not remove the garnishment proceedings, but that the same would proceed in the court where they were.⁵⁶

Garnishment an Action Entitling Parties to Change.

§ 327. But in Alabama it was held, without any such statute, that the removal of the principal case by consent of plaintiff and defendant would not carry the garnishment proceedings, or affect them; that the garnishee was not a party to the principal suit, and, as to

also, *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850; *Fischer v. Daudistal*, 9 Fed. 145.

⁵⁴ *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160.

⁵⁵ *Chase v. Foster*, 9 Iowa, 429.

⁵⁶ *Westphal v. Clark*, 42 Iowa, 371.

him, the removal order was *res inter alios actae*.⁵⁷ And in Missouri it was held that a change of venue in the garnishment case at the instance of the plaintiff did not affect the jurisdiction of the court over the principal case.⁵⁸ In Indiana it is held that garnishment supplementary to execution is an action within the statute, and the garnishee, as defendant, may have a change of venue as matter of right.⁵⁹ The decisions holding that the garnishment follows the main case on change of venue are no authority to the effect that the garnishee cannot have a change of venue, for no judgment can be rendered against him till the main action is in judgment, after which the reasons for keeping the two together are less.

Who may Have a Change of Venue, and When.

§ 328. It is said, in Wisconsin, that the removal of a cause from one tribunal to another is strictly a statutory right, to be enjoyed only by those to whom it is given, and therefore a defendant in execution cannot remove the cause against his garnishee. He has lost his right by allowing judgment to be entered against him.⁶⁰ In the same manner, the plaintiff, by taking judgment in the main action, loses his right of removal to the federal court.⁶¹ The intervening claimant is a party to the suit, and, as such, is entitled to a change

⁵⁷ Cross v. Spillman, 93 Ala. 170, 9 South. 362.

⁵⁸ Martin v. Chicago, R. I. & P. Ry. Co., 50 Mo. App. 428.

⁵⁹ Burkett v. Holman, 104 Ind. 6, 3 N. E. 406; Burkett v. Bowen, 104 Ind. 184, 3 N. E. 768, and 118 Ind. 379, 21 N. E. 38.

⁶⁰ Garland v. McKittrick, 52 Wis. 261, 9 N. W. 160; Weeks v. Billings, 55 N. H. 371.

⁶¹ Poole v. Thatcherdeft, 19 Fed. 49; Pratt v. Albright, 9 Fed. 634.

of venue upon his sole application, although the statute declare that no change shall be given unless all the plaintiffs or defendants join in the application for it; for his relations to the garnishee or the principal defendant do not make him a codefendant with either.⁶² Of course, the garnishee would be entitled to a change of venue upon the same ground.⁶³

⁶² *Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177. Compare *Maish v. Bird*, 48 Fed. 607.

⁶³ *Westphal v. Clark*, 42 Iowa, 371.

CHAPTER XV.**BRINGING IN CLAIMANTS OF THE GARNISHED PROPERTY,
AND TRYING THEIR RIGHTS.**

- § 329. General Considerations—What to Do When Claimants are Disclosed.
330. — When Claimant may Prosecute a Suit of His Own.
331. — Other Suits by Plaintiff or Garnishee.
332. Origin and Purpose of Intervening Acts.
333. Action is Stayed till Claimant is Interpleaded.
334. When Claims may be Made.
335. Who may Suggest That There are Claimants—Claimant may Appear and Assert His Claim.
336. — Garnishee may Suggest Claimants
337. — Plaintiff's Right to Suggest Claimants.
338. — Defendant's Right to Suggest Claimants.
339. — Authority of Court to Bring in Claimants of Its Own Motion.
340. Order of Court Interpleading Claimants.
341. Nature and Sufficiency of Notice to Claimants.
342. Forming the Issue between the Claimant and the Plaintiff—Claimant Has Affirmative, and Files First Pleading.
343. — He must Rely on the Strength of His Own Claim.
344. — Cannot Allege Errors in the Proceedings, nor Contest the Garnishee's Liability.
345. — Garnishee not a Party to This Issue.
346. — Plaintiff's Reply or Plea to Claimant's Complaint.
347. Trial of the Issue between Claimant and Plaintiff—This Issue is Tried before the Issue between Plaintiff and Garnishee.
348. — Trial to Jury—Right to Begin—Burden of Proof.
349. — Conduct of Trial—Rights and Defenses.
350. Judgment between Plaintiff and Claimant—Judgment in Favor of Plaintiff.
351. — Judgment in Favor of Claimant.

General Considerations.

What to Do When Claimants are Disclosed.

§ 329. It frequently happens that the answer alleges that persons other than the defendant claim to own the property or debt in respect to which the plaintiff seeks to charge the garnishee, and sometimes such persons come into court themselves to claim it. The first thing for the plaintiff to do, in such cases, is to take issue upon the garnishee's answer, if it is desired to controvert it; for the time for doing so will probably elapse before the claimant's rights could be determined.¹ He should then immediately proceed to bring in the claimant.

When Claimant may Prosecute a Suit of His Own.

§ 330. After the claimant has been made a party to the garnishment suit by appropriate proceedings, he cannot prosecute an action against the garnishee in any other court for the same subject-matter.² After becoming a party to these proceedings, his prior or subsequent suit is affected by them in the same manner that they affect actions brought by the defendant.³ But, unless made such a party, his statutory right to intervene is not exclusive, and he may ignore the garnishment, and proceed directly against the garnishee,⁴

¹ Little Wolf River Imp. Co. v. Jackson, 66 Wis. 42, 49, 27 N. W. 625.

² Rothschild v. Burton, 57 Mich. 540, 25 N. W. 49; Foy v. East Dallas Bank (Tex. Civ. App.) 28 S. W. 137; German Bank v. American Fire Ins. Co., 83 Iowa, 491, 50 N. W. 53.

³ Evitt v. Lowery Banking Co., 96 Ala. 381, 11 South. 442. As to actions by defendant, see ante, §§ 195, 220.

⁴ Rutherford v. Fullerton, 89 Ga. 353, 15 S. E. 471; Rice v. Jones,

or intervene in a chancery proceeding brought to determine the title to the property;° yet he cannot supersede the garnishment, and transfer the litigation to a court of equity, by making all interested persons parties to his bill, and restraining further proceedings at law, for the plaintiff has a right to be heard, and have all interests determined in the garnishment suit.⁶

Other Suits by Plaintiff or Garnishee.

§ 331. On the other hand, a bill filed by the plaintiff, in the same manner, and for the same purpose, will be dismissed by the court *ex mero motu*, because it seeks to accomplish only what might have been obtained in the garnishment proceedings,⁷ which, in themselves, after the claimant is made a party, are in the nature of a bill of interpleader.⁸ But when the same court has a law and equity side, it may, in some states, on motion and proper showing, transfer the case to the equity side of the court.⁹ And when a person is sued upon a demand in one state, and garnished for it in another, under circumstances which render it uncertain whether the judgment of either court would insure him against double liability, he may maintain a bill of interpleader in a still different state, where he can get service upon all parties, and

103 N. C. 226, 9 S. E. 571; *First Nat. Bank of Leadville v. Leppel*, 9 Colo. 594, 13 Pac. 776.

⁵ *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451.

⁶ *Baldwin v. Hosmer*, 101 Mich. 432, 59 N. W. 669; *Heyward v. Phillips-Buttoff Manuf'g Co.*, 97 Ala. 533, 11 South. 837.

⁷ *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139; *Sweet v. Oliver*, 56 Iowa, 744, 10 N. W. 275; *Egbert v. Hawk*, 12 N. J. Eq. 80.

⁸ *Bragg v. Gaynor*, 85 Wis. 408, 481, 55 N. W. 919, 923.

⁹ *Lockett v. Rumbough*, 40 Fed. 523.

thus compel them to settle their rights between themselves.¹⁰ And when a person summoned as garnishee in a federal court was afterwards sued in a state court by a claimant, it was held that he could sustain a bill of interpleader in the state court, although it does not appear, from the published opinion, that the claimant might not have been compelled to litigate his rights as a claimant in the garnishment suit.¹¹ On the other hand, it has been held that, after judgment against a garnishee, he cannot maintain interpleader against a claimant and the plaintiff in garnishment.¹² When the owners of a building were garnished, it was held that they could not interplead the garnishing creditors of the contractors with claimants of labor liens on the building, for the latter proceed against the building irrespective of the state of accounts between the owners and the contractor, while the garnishing creditors depend entirely upon an indebtedness due the contractor.¹³

Origin and Purpose of Intervening Acts.

§ 332. The practice of bringing in claimants to the garnished property to defend their rights is comparatively new, and the rules regulating it can hardly be said to be well settled yet.¹⁴ Before this proceeding

¹⁰ *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330; *Briant v. Reed*, 14 N. J. Eq. 271.

¹¹ *Moore v. Barnheisel*, 45 Mich. 500, 8 N. W. 531.

¹² *Holmes v. Clark*, 46 Vt. 22.

¹³ *Ammendale Normal Institute v. Anderson*, 71 Md. 128, 17 Atl. 1030. But see *Hitchcock v. Lancto*, 127 Mass. 514.

¹⁴ *National Bank of Galena v. Chase*, 71 Iowa, 120, 32 N. W. 202; *Moore v. Graham*, 58 Mich. 25, 24 N. W. 670; *Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

was adopted, the courts helped the plaintiff to make his suit effectual by casting upon the garnishee the burden of proving the validity of the claimant's title, and holding that, if the claimant failed to furnish the necessary evidence for that purpose, the garnishment judgment was conclusive against him.¹⁵ This method threw an unjust burden upon the garnishee, a disinterested party, did not adequately protect the rights of the claimant, and was certainly extending the doctrine of estoppel to its full limits, so as to seem almost an invasion of the principle that, except in proceedings purely in rem, none but parties are concluded by the judgment. Most of the statutes now provide that claimants of the property shall be summoned and made parties to the suit, after which their rights are litigated the same as in any action.

Action is Stayed till Claimant is Interpleaded.

§ 333. Under these statutes there can be no determination of the liability of the garnishee, after he has disclosed the claim, until the claimant is made a party to the proceedings, and his rights have been finally disposed of.¹⁶ If the plaintiff insists upon a judgment against the garnishee without bringing in the claim-

¹⁵ *Wentworth v. Weymouth*, 11 Me. 446; *Giddings v. Coleman*, 12 N. H. 153; *Foster v. Sinkler*, 4 Mass. 450; *Wood v. Partridge*, 11 Mass. 488. Compare *Donald v. Nelson*, 95 Ala. 111, 10 South. 317.

¹⁶ *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. 641; *Lyon v. Ballentine*, 63 Mich. 97, 105, 29 N. W. 837; *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571; *Mansfield v. Stevens*, 31 Minn. 40, 16 N. W. 455; *Look v. Brackett*, 74 Me. 347; *Kellogg v. Waite*, 99 Mass. 501; *Conshohocken Tube Co. v. Iron Car Equipment Co.*, 167 Pa. St. 592, 31 Atl. 949; *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 South. 589; *Connoley v. Cheesborough*,

ant,¹⁷ or if he fails to take proper steps, within a reasonable time, to have the claimant summoned, the court will dismiss the proceedings upon the application of the garnishee.¹⁸ The claimant's rights cannot be litigated till he is made a party to the proceedings and given an opportunity to be heard.¹⁹ Orders and

21 Ala. 166; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Marston v. Carr*, 16 Ala. 325; *Clark v. Few*, 62 Ala. 243.

"THE DUTY DEVOLVES ON THE PLAINTIFF to see that notice issues, and the court is bound to suspend further proceedings against the garnishee, and cause a notice to issue to the claimant to come and propound his claim." *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161; *Wicks v. Branch Bank*, 12 Ala. 594; *Security Loan Ass'n v. Weems*, 69 Ala. 584.

If neither party demands that the claimant be made a party, the court may proceed without him. *McKittrick v. Clemens*, 52 Mo. 160.

FUNDS TO PAY ALL CLAIMS: When it appears that the garnishee has sufficient funds in his hands to satisfy all claims and the plaintiff's demand, it is not necessary to make claimants parties. *Whalen v. McMahon*, 16 Colo. 373, 26 Pac. 583.

CLAIMANT OUT OF STATE: Held, that the suggestion of a claimant outside the jurisdiction could not defeat the action, as the statute is merely permissive, allowing claimants to appear. *Wheeler v. Winn*, 38 Vt. 122. *Contra*, *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700.

¹⁷ *Smith v. Holland*, 81 Mich. 471, 45 N. W. 1017; *Jordan v. Harmon*, 73 Me. 498.

¹⁸ *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700; *Boyd v. Cobbs*, 50 Ala. 82; *Look v. Brackett*, 74 Me. 347; *Mock v. King*, 15 Ala. 66.

When the plaintiff, instead of interpleading the claimant, proceeds against him as garnishee, he must be presumed to have abandoned his proceedings against the original garnishee. *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161.

¹⁹ *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. 641; *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80; *Simpson v. Tippin*, 5 Stew. & P. (Ala.) 208; *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161; *Adams v. Filer*, 7 Wis. 306; *State ex rel. Rogers v. Judge of County Court*, 11 Wis. 50; *McMahon v. Merrick*, 33 Minn. 262, 22 N. W. 543; *Foy v. East Dallas Bank* (Tex. Civ. App.) 28 S. W. 137.

decrees made in the case before he was made a party are not adjudications as to him.²⁰ If the claimant is the real owner of the property, and is not made a party to the proceedings, the garnishment judgment is conclusive against him only to the same extent that payments made to the principal defendant by the garnishee would be, unless the claimant is estopped by his own conduct.²¹ But, if summoned to appear and defend, he is bound by the garnishment judgment, whether he appears or not.²² If the claimant does not appear when summoned, judgment should be rendered against the garnishee for the amount admitted in his answer.²³

When Claims may be Made.

§ 334. When a claimant has been suggested and properly summoned, he should present his claim at the term of court at which he is summoned; but the court may, in its discretion, extend the time within which he may appear and assert his claim.²⁴ The statutes and decisions in the several states are not uniform as to the time within which claims to the garnished property may be made known and asserted. It has been held that claimants may make their claims known, and intervene, after the garnishee has been defaulted for not answering, and has been summoned on *scire facias*; ²⁵ or in the circuit court, after the defendant had

²⁰ *McMahon v. Merrick*, 33 Minn. 262, 22 N. W. 543.

²¹ See *ante*, §§ 203, 205.

²² See *ante*, § 204.

²³ *Saller v. Insurance Co. of North America*, 62 Ala. 221.

²⁴ *Ex parte Opdyke*, 62 Ala. 68.

²⁵ *Knights v. Paul*, 11 Gray (Mass.) 225; *Boylan v. Young*, 6 Allen (Mass.) 582.

appealed from the judgment rendered against the garnishee in justice court;²⁶ or after final judgment against the garnishee, and an order entered directing him to pay the money into court to satisfy the judgment in the main action, at any time before the money has been actually turned over to the plaintiff.²⁷ One case is reported in Michigan in which, after absolute judgment against the garnishee, and payment of it to the plaintiff by the garnishee, a claimant was allowed to intervene; and on his motion the judgment was set aside, and an issue as to the ownership of the garnished property made up and tried between the plaintiff and claimant, and verdict found for the claimant; and the supreme court approved of the proceeding, and ordered the garnishee discharged, saying that he could recover what he had paid to the plaintiff, and the claimant could proceed to collect his demand of the garnishee.²⁸ The payment of the money into court certainly is not, in itself, any obstacle to the presentation of the claims upon it, for the parties may litigate their right to it as well after as before;²⁹ but, after final judgment has been entered against the garnishee,

²⁶ *Daniels v. Clark*, 38 Iowa, 556.

²⁷ *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139; *Edwards v. Cosgro*, 71 Iowa, 296, 32 N. W. 350; *McGuire v. Pitts*, 42 Iowa, 535.

²⁸ *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80. Compare *Krupp v. Tabor*, 31 Mich. 174; *Heyward v. Phillips-Buttoff Manuf'g Co.*, 97 Ala. 533, 11 South. 837.

In a case similar to the one in Michigan an application was denied, it appearing that the judgment had stood undisturbed for two years, and there being evidence that claimant knew of it. *Lawrence Bank of Pittsburg v. Raney & Berger Iron Co.*, 77 Md. 321, 26 Atl. 119.

²⁹ *Edwards v. Cosgro*, 71 Iowa, 296, 32 N. W. 350; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451.

a claimant, asking to have the entry stricken off, and the case opened anew, and that he be allowed to prove his interest in the garnished property, must submit to the discretion of the court in allowing or denying a reopening of the case.³⁰ When the property was garnished in an attachment suit, it was held, in Colorado, that claimants have no right to intervene after the trial of the main action.³¹

Who may Suggest That There are Claimants.

Claimant may Appear and Assert His Claim.

§ 335. Under many of the statutes, any person claiming the debt or property garnished may come into court, assert his title, and have an order of court making him a party to the proceedings upon his own application, although the garnishee has disclosed positively that the property or debt belongs to the principal defendant,³² or has been defaulted for not answering at

³⁰ Dill v. Wilbur, 79 Me. 561, 12 Atl. 545.

³¹ Whalen v. McMahon, 16 Colo. 373, 26 Pac. 583.

³² Dennis v. Twitchell, 10 Metc. (Mass.) 180; Daniels v. Clark, 38 Iowa, 556; Wolff v. Vette, 17 Mo. App. 36; Webster v. Farnum, 60 N. H. 288; Hanaford v. Hawkins (R. I.) 28 Atl. 605; Haas v. Old Nat. Bank, 91 Ga. 307, 18 S. E. 188; Clark v. Wiss, 34 Kan. 553, 9 Pac. 231; 3 How. Ann. St. Mich. § 8085.

He may intervene to establish his claim, whether legal or equitable. Marvel v. Babbitt, 143 Mass. 226, 9 N. E. 566.

Though the statute says, "the court may permit each claimant to appear," etc., the claimant's right to appear is absolute, and it is error for the court to refuse his application. Boylen v. Young, 6 Allen (Mass.) 582.

A claimant of the debt owed by the garnishee may intervene, as well as a claimant of property in the garnishee's possession, though the statute in terms mention the latter only. Crone v. Braun, 23 Minn. 239; Kean v. Doerner, 62 Md. 475.

all.³³ No good reason appears why he may not intervene, without express statutory authority, if he volunteers to do so;³⁴ but decisions to the effect that he cannot are not wanting,³⁵ and it is said that, when the statute does not in terms allow the claimant to become a party to the proceedings of his own motion, "the intervention allowed in such cases is for the protection of the garnishees, and, if they do not invoke it for themselves, another cannot do it for them. 'Courts of justice are not open, like tournaments, for errant knights to enter and tilt at pleasure.' " ³⁶

Garnishee may Suggest Claimants.

§ 336. The garnishee is usually the party who discloses that there is a claimant to the property or debt in respect to which he is sought to be charged, and requests that such a person be made a party to the proceedings; and, under these statutes, it is error for the court to refuse to order that the claimant be made a

³³ Boylen v. Young, 6 Allen (Mass.) 582.

³⁴ Sims v. Goettle, 82 N. C. 268; Blair v. Puryear, 87 N. C. 101; Alamo Ice Co. v. Yancey, 66 Tex. 187, 18 S. W. 499.

But, if the court refuses his application to become a party, he cannot have the ruling reviewed by appeal, unless he excepts. Parks v. Adams, 113 N. C. 473, 18 S. E. 665.

³⁵ Pennsylvania Steel Co. v. New Jersey Southern Ry. Co., 4 Houst. (Del.) 572; Wimer v. Pritchett, 16 Mo. 252; Boylen v. Young, 6 Allen, 582; Heyward v. Phillips-Buttoff Manuf'g Co., 97 Ala. 533, 11 South. 837; Lanham v. Lanham, 30 W. Va. 222, 4 S. E. 273. Compare Hewitt v. Wagar Lumber Co., 38 Mich. 701; Cross v. Brown, 17 R. I. 568, 23 Atl. 761.

³⁶ Porter v. West, 64 Miss. 548, 8 South. 207. See, also, Cahoon v. Levy, 4 Cal. 243; Foster v. Sinkler, 4 Mass. 450; Muse v. Lehman, 30 Kan. 514, 1 Pac. 804.

party upon the garnishee's motion, or to proceed against the garnishee's objection, without doing so.³⁷

Plaintiff's Right to Suggest Claimants.

§ 337. Cases might arise in which the plaintiff would want to suggest a claimant of the property, and if he should, no one would be likely to raise any objection, which may account for the absence of decisions upon his right to do so; but, when the claimant has been suggested to the court, it is the plaintiff's duty to have an order of court made summoning and interpleading him, if he wishes to make his process effectual, for he cannot, without such interpleader, charge the garnishee.³⁸ He also has an absolute right to have the claimant interpleaded, and it is error for the court to dismiss the suit, upon the suggestion or statement by the garnishee that the property in his possession belongs to a stranger to the suit, until the plaintiff has had a reasonable opportunity to move for an order that he be summoned and interpleaded as provided by statute, or to overrule his motion therefor when made.³⁹

³⁷ *Alamo Ice Co. v. Yancey*, 66 Tex. 187, 18 S. W. 499.

Held, that the statement of the garnishee that the property in his possession belongs to and is the property of a certain person, but failing to show that such person ever claimed to own it, does not show that such person is a claimant, or entitle the garnishee to an order interpleading him. *John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 87 Wis. 435, 58 N. W. 743.

³⁸ *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161.

³⁹ *Easton v. Lowery*, 29 Ala. 454; *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50.

The plaintiff may move for the order to make the claimant a party at any time before the garnishee has been discharged for want of it, though subsequent to the term at which the garnishee's answer was filed. *Camp v. Hatter*, 11 Ala. 151.

Defendant's Right to Suggest Claimants.

§ 338. Sometimes the principal defendant disclaims all interest in the property in the garnishee's possession, and attempts to have the proceedings dismissed on that ground, or have some person whom he claims to own the property summoned to show his rights to it.⁴⁰ What reason he has to complain that his debts are being paid with some other person's money is not plain, and the fact of his objecting would in most cases excite suspicion of a sinister motive; but, aside from this fact, he is not a party to the garnishment suit unless made so, and, having no interest at stake, he has no standing upon which to invoke the action of the court.⁴¹

Authority of the Court to Bring in Claimants of its Own Motion.

§ 339. Whether the court may take notice that others than the defendant claim the property in the garnishee's hands, when the fact does not appear from the proceedings, and is not suggested by any party to the suit, or by such claimants in court, and of its own motion require that such persons be made parties to the suit, seems to have arisen in an early case in California, in which it is said that the court cannot presume the existence of claims.⁴² But, when the evi-

⁴⁰ Meadowcroft v. Agnew, 89 Ill. 469; Lee v. Robinson, 15 R. I. 369, 5 Atl. 290; Daniels v. Clark, 38 Iowa, 556.

When the defendant has an interest in the property as mortgagor, and comes in to see that the mortgage is sustained, and the mortgagee's interest protected, held, that he has a right to do so. P. Cox Manuf'g Co. v. August, 51 Kan. 59, 32 Pac. 636. So when he acts as agent for the claimant. Meadowcroft v. Agnew, 89 Ill. 469.

⁴¹ Parks v. Adams, 113 N. C. 473, 18 S. E. 665; Lanham v. Lanham, 30 W. Va. 222, 4 S. E. 273.

⁴² Cahoon v. Levy, 4 Cal. 243.

dence before it shows that there are claimants to the property, why may not the court, under these statutes, interplead such claimants of its own motion, and issue summons to them? ⁴³ In some states it is its duty to do so.⁴⁴

Order of Court Interpleading Claimants.

§ 340. The claimant has no standing in court till an order has been entered making him a party,⁴⁵ but the objection is waived when the plaintiff and the court have recognized and treated him as such.⁴⁶

Nature and Sufficiency of the Notice to the Claimant.

§ 341. It is difficult to determine, in most cases, what manner of notice is contemplated by these statutes; and, as the garnishee may, without any order or

⁴³ *Hanaford v. Hawkins* (R. I.) 28 Atl. 605; *Chesapeake, etc., Ry. Co. v. Paine*, 29 Grat. (Va.) 502. But see *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675.

⁴⁴ *Easton v. Lowery*, 29 Ala. 454; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161.

⁴⁵ *Rowell v. Felker*, 51 Vt. 526. Compare *Tyler v. Coolbaugh*, 7 Iowa, 474.

Held, that a commissioner has no authority to enter such an order, or recognize the claimant, against the plaintiff's objection. *Rowell v. Felker*, above.

Held, that the court may impose, as a condition to the intervener's right to intervene, that he sign a stipulation to restore to a receiver of the court the garnished fund taken into a foreign court. *Brown v. Gary*, 43 Ill. App. 482.

⁴⁶ *Williams v. Pomeroy*, 27 Minn. 85, 6 N. W. 445; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. 379. Compare *Sheldon v. Hinton*, 6 Ill. App. 216.

summons by the court, protect himself from future liability to any one by simply informing him of the proceedings, and commanding him to appear and assume the defense, or be bound by the judgment therein rendered,⁴⁷ the question is not likely to arise often, for the claimant usually feels that he can better protect his rights by becoming a party himself, than by merely assuming the defense of the garnishment suit. The summons to the claimant is a notice, and not a pleading.⁴⁸ In a Michigan case it was held that it need not amount to a legal process; and it would seem to have been the opinion of the court that all that is necessary, under these statutes, is such a summons from the court as would operate as an estoppel if emanating from the garnishee.⁴⁹ A summons to appear and answer as garnishee is not sufficient.⁵⁰ Informal notice by the plaintiff's counsel to an attorney of the time when a motion for judgment against the garnishee will be made is not sufficient, when it is proven that such attorney was not attorney for the claimant when the notice was served, which fact was known to the garnishee.⁵¹ When the court made an order directing that an alleged claimant "should be made a party, and that notice should be served on him," without prescribing how it should be served, the order was construed as meaning personal service within the state, and personal service without the state was held not to be suffi-

⁴⁷ See ante, § 204.

⁴⁸ *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827.

⁴⁹ *Rothschild v. Burton*, 57 Mich. 540, 25 N. W. 49; *Bragg v. Gaynor*, 85 Wis. 468, 481, 55 N. W. 919, 923.

⁵⁰ *Edwards v. Levinsohn*, 80 Ala. 447, 2 South. 161; *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571; *Emmons v. Dowe*, 2 Wis. 322, 358.

⁵¹ *Osner v. Dieterle* (Pa. Sup.) 10 Atl. 43.

cient, because substituted service by publication, or service outside the jurisdiction, to have been warranted, must have been so directed; the court expressly refusing to decide the question whether valid service could be made out of the state without publication in the state.⁵² Where there are several claimants all should be summoned.⁵³

Forming the Issue between the Claimant and the Plaintiff.

Claimant Has Affirmative and Files First Pleading.

§ 342. The claimant having been made a party to the proceedings, and summoned, the affirmative is upon him, and it is his duty to file the first pleading, in the nature of a complaint, setting up his claim,⁵⁴ and

⁵² *Levy v. Miller*, 38 Minn. 526, 38 N. W. 700.

Held, that a nonresident may be served by publication. *Sheppard v. Buford*, 7 Ala. 91.

⁵³ *Evans v. Norman*, 14 Ala. 662.

⁵⁴ *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827; *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. 818; *Russell v. Thayer*, 30 Vt. 525; *Carpenter v. McClure*, 37 Vt. 127, 132. Compare *Mahoney v. McLean*, 28 Minn. 63, 9 N. W. 76.

Where the assignee was summoned and appeared, and the record did not show any allegation by the plaintiff against him, it was held that an order discharging the assignee will be upheld, as it is to be presumed that the plaintiff has abandoned the pursuit of his garnishment. *Goodwin v. Brooks*, 6 Ala. 836. This is a suit in which the claimant is defendant. *Heyward v. Phillips-Buttoff Manuf'g Co.*, 97 Ala. 533, 11 South. 837.

PLAINTIFF MAY WAIVE CLAIMANT'S COMPLAINT: When the case has reached the supreme court, it is too late to object that no allegations have been filed by the claimant, where a trial has been had of the claims of the respective parties, upon their substantial merits. *Towne v. Leach*, 32 Vt. 745.

After the case has been referred to a commissioner, it is too late

alleging such facts as he thinks he will be able to prove, and which, if proved, will show that his right to the property is paramount;⁵⁵ or he may simply appear and disclaim all interest in it, in which case the garnishee may be charged for the amount of his admitted liability.⁵⁶ The claimant is entitled to judgment only on the grounds alleged in his complaint.⁵⁷

He must Rely on the Strength of His Own Claim.

§ 343. The claimant is made a party merely for the purpose of determining whether he has such an interest in the property that the plaintiff cannot have a judgment condemning it to the satisfaction of his claim against the principal defendant. Therefore, the only

to object to the introduction of evidence before him, on the ground that no allegations have been filed by the claimant. "On the coming in of the commissioner's report, if it had appeared that the plaintiff had been prejudiced in the hearing before the commissioner, through the failure of the claimant to file allegations setting forth his claim to the funds, the county court might, in the exercise of a sound discretion, have ordered such allegations filed, and that the matter be reheard before the commissioner. But, if that court was satisfied that the plaintiff had not been prejudiced in the hearing before the commissioner by such neglect or failure of the claimant, it would not be the duty of that court to set aside the report and order a new hearing. The report of the commissioner furnished the facts necessary for the foundation of the judgment of the county court. Whether the absence of allegations filed by the claimant furnished any substantial ground for setting aside the report of the commissioner was addressed to the sound discretion of the county court." *Carr v. Sevene*, 47 Vt. 574.

⁵⁵ *Scott v. Stallworth*, 12 Ala. 25; *Reynolds v. Collins*, 78 Ala. 94; *McMahon v. Merrick*, 33 Minn. 262, 22 N. W. 543; *Wynne v. State Nat. Bank of Ft. Worth*, 82 Tex. 378, 17 S. W. 918; *Bassett v. Parsons*, 140 Mass. 169, 3 N. E. 547.

⁵⁶ *Mortland v. Little*, 137 Mass. 339.

⁵⁷ *King v. Bird*, 85 Iowa, 535, 52 N. W. 494; *Stein v. Seaton*, 51 Iowa, 18, 50 N. W. 576.

matter in which he is concerned is to show his superior title. He must rely upon the strength of his own claim.⁵⁸

Cannot Allege Errors in the Proceedings nor Contest the Garnishee's Liability.

§ 344. It is immaterial to him whether the garnishee is liable to the defendant for one dollar or a thousand,⁵⁹ or whether it is subject to be reached by

⁵⁸ Boylen v. Young, 6 Allen (Mass.) 582; Gifford v. Rockett, 119 Mass. 71; Clark v. Gardner, 123 Mass. 358; Moors v. Goddard, 147 Mass. 287, 17 N. E. 532; Hewitt v. Follett, 51 Wis. 264, 272, 8 N. W. 177; National Bank of Galena v. Chase, 71 Iowa, 120, 32 N. W. 202; Blackman v. Smith, 8 Ala. 203; Carpenter v. McClure, 37 Vt. 127; Davis v. Fogg, 58 N. H. 159.

NATURE OF ISSUE ILLUSTRATED: The question is, not whether the property belongs to the defendant, but whether it belongs to the claimant. Teichman Commission Co. v. American Bank, 27 Mo. App. 676.

A claim to the specific debt garnished must be shown, and not a mere right of action against the defendant. Sibley v. Johnson, 43 Vt. 67; Speed v. Holmes (Ky.) 32 S. W. 404. Compare Boylen v. Young, *supra*.

The plaintiff cannot maintain his claim by showing that the property belongs to himself, regardless of the garnishment. Lawrence v. McKenzie, 88 Iowa, 432, 55 N. W. 505; Johnson v. Brant, 38 Kan. 754, 17 Pac. 794.

The wife of the defendant having intervened as claimant, the question as to whether it is exempt in favor of the defendant is not in issue, unless that is the ground of her claim to it. Stein v. Seaton, 51 Iowa, 18, 50 N. W. 576.

Adverse claimants cannot, in the garnishment suit, litigate between themselves as to their respective rights to the garnished property. Peck Bros. & Co. v. Stratton, 118 Mass. 406. And see post, § 351.

The advancer of purchase money becomes a simple creditor, entitled to nothing purchased, against a garnishment of it. Sanders v. Page, 11 Colo. 518, 19 Pac. 468.

⁵⁹ Hewitt v. Follett, 51 Wis. 264, 272, 8 N. W. 177.

garnishment.⁶⁰ To deny that, at the time of service of the garnishment summons, the garnishee was indebted or had in his possession any property would be to prove himself out of court.⁶¹ He cannot take advantage of errors in the proceedings, either against the garnishee or the principal defendant,⁶² nor contest the garnishee's liability in any other manner than above stated.⁶³

Garnishee not a Party to This Issue.

§ 345. The garnishee,—a stakeholder, merely—is interested in the proceedings between the claimant and the plaintiff only to see that the former is properly interpleaded and summoned, and himself thus insured from double liability. He is not a necessary or proper party to the issue between them, and should not be joined as a party.⁶⁴

⁶⁰ Scott v. Stallworth, 12 Ala. 25.

⁶¹ Clark v. Gardner, 123 Mass. 358; Moors v. Goddard, 147 Mass. 287, 17 N. E. 532.

⁶² Blackman v. Smith, 8 Ala. 203; Clark v. Few, 62 Ala. 243; Iselin v. Simen (Minn.) 64 N. W. 143. Compare Black v. Brisbin, 3 Minn. 360 (Gil. 253); Lackett v. Rumbaugh, 45 Fed. 23, 34.

⁶³ Dalton v. Dalton, 48 Me. 42; Germania Sav. Bank v. Peuser, 40 La. Ann. 796, 5 South. 75.

Admitting this proposition, held that, on knowledge of the facts shown by the claimant, it would be the duty of the court to withhold a judgment which might inure to the injury of parties not before the court. Fairchild v. Lampson, 37 Vt. 407.

⁶⁴ Fish v. Keeney, 91 Pa. St. 138; Hewitt v. Follett, 51 Wis. 264, 272, 8 N. W. 177; Carpenter v. McClure, 37 Vt. 127, 132.

GARNISHEE'S RELATION TO ISSUE: Held, that an agreed statement of facts, upon which the issue between the claimant and the plaintiff is to be submitted to the court for decision, need not be signed by the garnishee. Segee v. Downes, 143 Mass. 240, 9 N. E. 565.

But, if the statement is made, not merely for the purpose of determining whether the claimant could maintain his claim, but for the

Plaintiff's Reply or Plea to Claimant's Complaint.

§ 346. The claimant's complaint having been duly filed, the plaintiff should take action upon it within the time allowed him therefor, and, unless answered, it will be taken as true.⁶⁵ It is error for the court to dismiss the proceedings, upon motion of the interveners, before the expiration of the time allowed by law for the plaintiff to take issue upon or answer the complaint.⁶⁶ If, because of the omission of some allegation, or for some matter appearing upon the face of the complaint, it does not show sufficient facts to support the claimant's contention, he may file a demurrer to it.⁶⁷ And he should do so if he intends to take advantage of the defect, for his subsequent pleadings

purpose of determining whether the garnishee could be charged, without reference to his answer, the court will not consider it, unless it is signed by the garnishee. *Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86.

The garnishee has no right to be heard as to the validity of the claimant's claim, when the latter is in court for that purpose. *Segee v. Downes*, 143 Mass. 240, 243, 9 N. E. 565.

When the garnishee is the claimant, ordinarily, the whole question may be tried at once. *Russell v. Thayer*, 30 Vt. 525.

⁶⁵ *Williams v. Van Metre*, 19 Ill. 293; *Meadowcroft v. Agnew*, 89 Ill. 469.

⁶⁶ *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. 818.

⁶⁷ *Wynne v. State Nat. Bank*, 82 Tex. 378, 17 S. W. 918; *Alamo Ice Co. v. Yancey*, 66 Tex. 187, 18 S. W. 499.

DEMURRER ADMITS FACTS PLEADED: When no issue of fact is taken upon an interpleader in a proceeding by garnishment, but a demurrer is filed to the same, the facts alleged in the interpleader will be deemed admitted, and no proof of them is required. *Meadowcroft v. Agnew*, 89 Ill. 469.

SPECIFIC STATEMENTS OF OBJECTION: An objection to a claim for "legal insufficiency," and because it does not "meet the requirements of the statute," is too general. *Larey v. Baker*, 85 Ga. 687, 11 S. E. 800.

may furnish the necessary matter, and, if they do, that cures the omission.⁶⁸ If the complaint states sufficient facts to sustain the claimant's claim, but he can avoid the effect by other facts, he should set them up by way of answer, or, if not, he may simply take issue on the facts stated in the complaint.⁶⁹ The plaintiff need not allege, in his answer to the claimant's complaint, that he is a creditor of the principal defendant, that he has attached the property by garnishment, or any fact that is alleged in his own complaint or declaration, or appears in the proceedings in the action.⁷⁰ This follows from what we have already said as to the nature of the issue.

Trial of the Issue between the Claimant and Plaintiff.

This Issue is Tried before the Issue between the Plaintiff and Garnishee.

§ 347. In the regular and natural order of proceedings, the issue between the claimant and plaintiff should be tried before the issue between the plaintiff and the garnishee, because, if it results in favor of the claimant, it renders all further proceedings unnecessary, or, at least, determines to what extent the plain-

⁶⁸ *McMahon v. Merrick*, 33 Minn. 262, 22 N. W. 543.

After taking issue on the complaint, and proceeding to trial, it is too late for the plaintiff to object that it was not verified, or was out of time. *Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

All informality in forming the issue between the plaintiff and claimant is waived by going to trial. *Towne v. Leach*, 32 Vt. 747; *Larey v. Baker*, 85 Ga. 687, 11 S. E. 800.

⁶⁹ *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827; *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. 818.

⁷⁰ *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827.

tiff cannot have the garnishee charged; and, on the other hand, if it results in favor of the plaintiff, it ends all the rights of the claimant in the case, and the plaintiff may proceed the same as if there had been no interpleader at all. This is the course usually indorsed by the courts, in the absence of express statutory regulation.⁷¹ However, it is a matter of practice merely. Whichever issue is first tried, the court can arrive at the justice of the case. Sometimes the opposite course is pursued,⁷² and sometimes the two issues are tried together.⁷³ If, by his answer, the garnishee confess absolute liability, unless the property belongs to the claimant, and elects to pay the same into court, and be discharged from further liability, as provided by statute, there is but one issue to try, and the question cannot arise; but, if the garnishee does not pay over the property, and become discharged, as suggested, the plaintiff must, after the defeat of the claimant, pursue his remedy against the garnishee.⁷⁴

Trial to Jury—Right to Begin—Burden of Proof.

§ 348. There has been considerable discussion as to whether the claimant has an absolute right to a trial by jury, but there are few decisions upon the question.⁷⁵ If such a right exists, it may be waived; and

⁷¹ *Hewitt v. Follett*, 51 Wis. 264, 272, 8 N. W. 177.

⁷² *Germania Sav. Bank v. Peuser*, 40 La. Ann. 796, 5 South. 75; *Wheatley v. Strobe*, 12 Cal. 92, 99.

⁷³ *Moors v. Goddard*, 147 Mass. 287, 290, 17 N. E. 532; *Farrell v. Farnan* (Md.) 5 Atl. 622.

⁷⁴ *Pecard v. Home*, 91 Mich. 346, 51 N. W. 891. See, also, post, § 350.

⁷⁵ JURY TRIAL: Upon the general subject of the right to trial by jury, see cases cited on page 504 of *Cooley, Const. Lim.* (6th Ed.).

After the garnishee and claimant had elected to try the case before

he cannot complain that he has been deprived of a jury trial, when he has not requested it.⁷⁶ The position of the claimant in the trial of the issue is almost identical with that of a plaintiff in an ordinary action, while the garnishment plaintiff occupies the place of a defendant. The claimant has the affirmative of the issue, as mentioned in a preceding section,⁷⁷ and, logically, is the proper person to open and close.⁷⁸ The burden is upon him to establish his claim by a preponderance of evidence.⁷⁹ The claimant must prove

the court on motion, and after part of the testimony had been taken, they abandoned such motion, filed a plea, and demanded a trial to a jury. Held, that the court did not err in allowing the claimant a jury trial, inasmuch as a jury was the only tribunal competent, except by consent. *Farrell v. Farnan* (Md.) 5 Atl. 622.

⁷⁶ *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827.

⁷⁷ See ante, § 342.

⁷⁸ *Randolph Bank v. Armstrong*, 11 Iowa. 515; *Sanger v. Flow*, 1 C. C. A. 56, 48 Fed. 152; *Thomp. Trials*, c. 9; *Best, Beg. & Rep. Contra*, *Grady v. Hammond*, 21 Ala. 427.

"Such a proceeding is a suit, in which the plaintiff is the actor and the claimant is the defendant." *Heyward v. Phillips-Buttolf Manuf'g Co.*, 97 Ala. 533, 11 South. 837; *Treadway v. Treadway*, 56 Ala. 390; *McAdams v. Beard*, 34 Ala. 478.

⁷⁹ *Donnelly v. O'Connor*, 22 Minn. 309; *North Star Boot & Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. 334; *Smith v. Barclay*, 54 Minn. 47, 55 N. W. 827; *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276; *Poole v. Carhart*, 71 Iowa, 37, 32 N. W. 16; *National Bank of Galena v. Chase*, 71 Iowa, 120, 32 N. W. 202; *Clark v. Few*, 62 Ala. 243; *Reynolds v. Collins*, 78 Ala. 94; *Waco State Bank v. Stephenson Manuf'g Co.*, 4 Tex. Civ. App. 137, 23 S. W. 234; *Hart v. Rafter*, 78 Ga. 478, 3 S. E. 699; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. 379. But see *Hörn v. Booth*, 22 Ill. App. 385; *Bassett v. Garthwaite*, 22 Tex. 230.

It is error to discharge the garnishee, on motion of the claimant, without proof, under the claimant's complaint, showing his superior rights. *National Bank of Galena v. Chase*, *supra*.

If there is any evidence to support the finding in favor of the

the amount of his claim ⁸⁰ by competent evidence of competent witnesses.⁸¹

claimant, it will not be disturbed. *Dietz v. Bignall*, 86 Mich. 292, 49 N. W. 148.

The evidence for the intervener being sufficient to make out a prima facie case, and being uncontradicted, he is entitled to judgment, *Easley v. Gibbs*, 29 Iowa, 129; and it is error for the court to pass judgment against him merely because the evidence looks strange, it not being inconsistent, *Second Nat. Bank of Winona v. Donald*, 56 Minn. 491, 58 N. W. 269.

He must prove his case, not merely against the defendant, but against the plaintiff, who, by proper adverse proceedings, has put the question to proof. *Richardson v. Rogers*, 45 Mich. 591, 595, 8 N. W. 526.

EVASIVE STATEMENTS: A just regard for the rights of creditors requires that the claimant make full, true, and explicit answers to all questions propounded to him concerning his claim; and evasive answers to questions put to him, or want of candor on his part, will be given the strongest construction against him, and cause his claim, justly, to be viewed with suspicion, or disallowed. *Thompson v. Reed*, 77 Me. 425, 1 Atl. 241; *Hart v. Rafter*, 78 Ga. 478, 3 S. E. 699.

WHAT CLAIMANT MUST SHOW: Proof of an assignment, reciting that it is given for a valuable consideration, will not entitle the assignee to the property, against the plaintiff in garnishment, in the

⁸⁰ *Poole v. Carhart*, 71 Iowa, 37, 32 N. W. 16.

⁸¹ *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364, 55 N. W. 496; *Ripley v. People's Sav. Bank*, 119 Ill. 341, 9 N. E. 894.

COMPETENT EVIDENCE: Neither the declarations of the garnishee out of court (*Phillips v. Thurber*, 56 Ga. 393), nor his answer filed in the cause, are competent evidence in favor of the claimant (*Scott v. Stallsworth*, 12 Ala. 25. Compare *Donnelly v. O'Connor*, 22 Minn. 309). But the garnishee himself is a competent witness, and may testify for the claimant. *Wilson v. Hanson*, 20 N. H. 375. And so may the principal defendant. *Randolph Bank v. Armstrong*, 11 Iowa, 515.

In Illinois and Massachusetts the claimant cannot contradict the answer of the garnishee. *Meadowcroft v. Agnew*, 89 Ill. 469; *First Nat. Bank of Clinton v. Bright*, 126 Mass. 535; *Sheehan v. Marston*, 132 Mass. 161.

Conduct of Trial—Rights and Defenses.

§ 349. The issue is tried in the same manner as in ordinary cases,⁸² and the claimant must have the same opportunities to protect his interests as are accorded to any party to an action.⁸³ The commissioner appointed to take the testimony has no authority to pass upon the claimant's rights.⁸⁴ The claimant having rested his case, the plaintiff may give any competent

absence of proof of what the consideration was, or that there was any. *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276; *Scott v. Stallworth*, 12 Ala. 25.

The production of a note of the garnishee, with an indorsement on it, is not sufficient to show that the indorsement was made before the service of the garnishment. *Camp v. Hatter*, 11 Ala. 151, 155. The garnishment and assignment being on the same day, the burden is on the claimant to show that the assignment was first. *Bergman v. Sells*, 39 Ark. 97.

Proof of a policy of insurance made payable to the claimant as his interest may appear is no evidence that he has any interest. *Donnelly v. O'Connor*, 22 Minn. 309.

The claimant, being a receiver of the defendant's property, appointed by a court of another state on the same day that the garnishment summons was served, must fail, unless he shows that his appointment was prior in time to the service of the garnishment summons. *Cohen v. Supreme Sitting of Order of Iron Hall (Mich.)* 63 N. W. 304.

Compare *Clark v. Raymond (Iowa)* 66 N. W. 86.

Fraud will not be presumed, and an assignment valid upon its face is sufficient, and the burden is on the one attacking it. *Sheldon v. Hinton*, 6 Ill. App. 216; *Horn v. Booth*, 22 Ill. App. 385.

⁸² *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. 818.

⁸³ *Donnelly v. O'Connor*, 22 Minn. 309.

WAIVER: But if he fails to avail himself of his rights, when allowed full opportunity at the proper time, he cannot complain. *Id.*

EQUITABLE RIGHTS: He may assert his rights, whether legal or equitable. *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566; *Jenness v. Wharff (Me.)* 32 Atl. 908; *Cram v. Shackleton*, 64 N. H. 44, 5 Atl. 715.

⁸⁴ *Boutwell v. McClure*, 30 Vt. 674.

evidence⁸⁵ to disprove his claim, or show that it is void or fraudulent.⁸⁶

Judgment between the Plaintiff and the Claimant.

Judgment in Favor of Plaintiff.

§ 350. Judgment may be rendered against the claimant, either for his failure to appear when properly summoned,⁸⁷ or for his failure to follow up his case after appearing, or for his failure to prove his claim upon the trial.⁸⁸ If judgment goes against him, it is that he be forever concluded from asserting his claim against the garnishee for the property or debt for which the garnishee may be charged in the suit,⁸⁹ and that the plaintiff recover against him the costs expended about the trial of the issue;⁹⁰ and the claimant has

⁸⁵ The answer of the garnishee is not competent evidence for the plaintiff against the claimant. *Easley v. Gibbs*, 29 Iowa, 129. *Contra*, *Morrell v. Rogers*, 1 Me. 328; *Reynolds v. Collins*, 78 Ala. 94.

Declarations of the defendant out of court are not evidence against the claimant. *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107.

⁸⁶ He may show that the judgment under which the claimant claims is fraudulent, and collusively entered. *Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772. *Sommer v. Gilmore*, 160 Pa. St. 129, 28 Atl. 654.

Great latitude of inquiry should be allowed when it is attempted to show fraud. *North Star Boot & Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. 334; *Cummings v. Fearey*, 44 Mich. 39, 6 N. W. 98.

⁸⁷ *Mobile & O. Ry. Co. v. Whitney*, 39 Ala. 468; *Saller v. Insurance Co. of North America*, 62 Ala. 221; *Evans v. Norman*, 14 Ala. 662. See, also, *ante*, § 204.

⁸⁸ See *ante*, § 204.

⁸⁹ See *ante*, § 204.

⁹⁰ *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630.

JUDGMENT FOR COSTS ONLY: The plaintiff can have no judgment against the claimant, except for costs. He cannot have a judg-

no further connection with the case,⁹¹ unless he appeals.⁹² But it does not necessarily follow, from judgment for the plaintiff in the trial with the claimant, that the plaintiff is entitled to a judgment against the garnishee,⁹³ or that the claimant has no right of action. All that is adjudicated is that the right of the plaintiff in garnishment is paramount to that of the claimant.⁹⁴ The plaintiff is not thereby entitled to judgment against the garnishee, unless the answer of the garnishee admits liability to the defendant.⁹⁵ If the garnishee's answer admits an absolute liability to the de-

ment against him for the amount of his claim against the principal defendant. *Pecard v. Home*, 91 Mich. 346, 51 N. W. 891.

When a claimant appears, and the money in court is paid to him upon his application, judgment cannot thereafter be rendered against him therefor in favor of the plaintiff. *Echol's Appeal*, 129 Pa. St. 554, 18 Atl. 559.

When a claimant recovers about half of what he claims, costs need not be awarded to either party. *White v. Kilgore*, 78 Me. 323, 5 Atl. 70. Or the court may allow the claimant costs. *Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

Held, that judgment for costs cannot be rendered against a supposed claimant, who has been duly summoned, but never appeared. *Evans v. Norman*, 14 Ala. 662.

⁹¹ *Hewitt v. Follett*, 51 Wis. 272, 8 N. W. 177.

⁹² See post, §§ 403-409.

⁹³ *Brown v. Gummersell*, 30 Mo. App. 341.

⁹⁴ *Oppenheimer v. Hamrick*, 86 Iowa, 584, 53 N. W. 312.

⁹⁵ *Mobile & O. Ry. Co. v. Whitney*, 39 Ala. 468.

REFUSAL OF CLAIMANT TO APPEAR: The fact that the claimant refused to appear under the terms imposed and leave granted by the court does not prevent the discharge of the garnishee. The issue between the plaintiff and the garnishee remains as if no motion or order for the claimant to appear had been made, and the garnishee, upon that issue, can be charged only upon competent evidence of his having in his possession property belonging to the defendant. If the garnishee show that the property really belongs to the claimant, he must be discharged, though the claimant refuse to appear. *Cram v. Shackleton*, 64 N. H. 44, 5 Atl. 715.

fendant, except as affected by the claimant's contention, the plaintiff is entitled to a judgment against the garnishee, upon judgment being rendered against the claimant, in the same manner as if no claimant had been suggested.⁹⁶ Under any other circumstances, disposing of this issue merely clears the way for the plaintiff to prosecute his suit against the garnishee.⁹⁷

Judgment in Favor of Claimant.

§ 351. If the judgment be in favor of the claimant, it is that the garnishment proceedings be dismissed and the garnishee be discharged;⁹⁸ or that the plaintiff do not recover against the garnishee for so much of the garnished property as the claimant has shown to belong to himself,⁹⁹ and that from the plaintiff the claimant recover his costs about his suit expended.¹⁰⁰

⁹⁶ Stockwell v. Silloway, 113 Mass. 382; Carpenter v. McClure, 37 Vt. 127, 132.

⁹⁷ Cram v. Shackleton, 64 N. H. 44, 5 Atl. 715; Evans v. Norman, 14 Ala. 662; Pecard v. Home, 91 Mich. 346, 51 N. W. 891.

⁹⁸ Carpenter v. McClure, 37 Vt. 127, 132; First Nat. Bank v. Mellen, 45 Mich. 413, 8 N. W. 80; Hewitt v. Follett, 51 Wis. 272, 8 N. W. 177.

AFTER PAYMENT TO PLAINTIFF: If the plaintiff has already been paid the garnished property by the garnishee, the judgment also includes a judgment that the garnishee recover the same back from the plaintiff. First Nat. Bank v. Mellen, 45 Mich. 413, 8 N. W. 80.

⁹⁹ Whalen v. McMahon, 16 Colo. 373, 26 Pac. 583; Gifford v. Rockett, 119 Mass. 71.

¹⁰⁰ Kirby v. Corning, 54 Wis. 599, 12 N. W. 69; Hewitt v. Follett, 51 Wis. 272, 8 N. W. 177; Seals v. Halloway, 77 Ala. 344; Lackett v. Rumbaugh, 45 Fed. 39.

COSTS WITHOUT STATUTE: Though the statute do not provide for an allowance of costs to a claimant by that designation, yet he occupies the position of a defendant party to the suit, and, as such, is entitled to costs. Mahoney v. McLean, 28 Minn. 63, 9 N. W. 76.

In the absence of statute, costs are discretionary with the court in such cases, following the rule which governs in equitable proceed-

He cannot, in that proceeding, recover judgment against the garnishee, but is left to pursue his remedy the same as if no garnishment suit had been brought.¹⁰¹

ings. *White v. Kilgore*, 78 Me. 323, 5 Atl. 70; *Moore v. Graham*, 58 Mich. 25, 24 N. W. 670; *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. 723; *Morrison v. McDermott*, 6 Allen (Mass.) 122.

When both the plaintiff and the claimant claim the whole fund, and the trial results in a division of it nearly equally between them, it is not inequitable to give costs to neither party. *White v. Kilgore*, 78 Me. 323, 5 Atl. 70. Or costs may be allowed to the claimant. *Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

When the claimant is called upon to establish his rights to the property garnished in justice court, and appeals from a judgment against him to the circuit court, where he sustains his claim, he cannot be taxed with costs, in the absence of a statute providing for them in such cases, but is entitled to costs in his favor. *Winne v. Lenawee Circuit Judge*, 74 Mich. 329, 42 N. W. 279.

COSTS AGAINST GARNISHEE: When a garnishee causes a claimant to be unnecessarily impleaded, the claimant may recover costs against him. *Little Wolf River Imp. Co. v. Jackson*, 66 Wis. 42, 27 N. W. 625. Otherwise, the garnishee cannot be taxed with costs on this issue. *Tupper v. Cassel*, 45 Miss. 352; *Morrison v. McDermott*, 88 Mass. 122.

¹⁰¹ *Carpenter v. McClure*, 37 Vt. 126, 132; *Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177; *Tupper v. Cassel*, 45 Miss. 352; *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80.

He can have no judgment, except in the matter of costs, against either plaintiff, defendant, or garnishee. *Moors v. Goddard*, 147 Mass. 287, 290, 17 N. E. 532; *Gifford v. Rockett*, 119 Mass. 71.

ADVERSE CLAIMANTS CANNOT LITIGATE their respective rights between themselves in the garnishment suit. The only judgment that can be given, if the plaintiff abandons the proceedings, is that they be dismissed, and the garnishee discharged. *Peck Brothers & Co. v. Stratton*, 118 Mass. 406; *Deering v. Richardson-Kimball Co. (Cal.)* 41 Pac. 801; *Shattuck v. Smith*, 16 Vt. 132, 134. But see *Wing v. Woodward*, 56 Vt. 723. Held that, when the matter is before a court of equity, the court may adjudicate all rights in one decree. *Lackett v. Rumbaugh*, 45 Fed. 23.

CHAPTER XVI.

THE ISSUE BETWEEN THE PLAINTIFF AND THE GARNISHEE.

- § 352. Issue—How Formed—Procedure Purely Statutory.
- 353. — The Affidavit a Declaration—The Answer a Plea.
- 354. — New Declaration or Action against Garnishee.
- 355. — Irregularities are Waived by Going to Trial.
- 356. — Notice of Taking Issue on the Answer of the Garnishee.
- 357. Specific Allegations—How Far Required—Must Show Nature of Claim, and State Cause of Action.
- 358. — Proof of Facts not Alleged—Amendments.
- 359. — Attacking Sufficiency of Allegations.
- 360. When Issue may be Taken on the Answer—Reasonable Time—Statutory Period.
- 361. — Taking Issue after Time Limited.
- 362. — After Judgment or Motion for Judgment.
- 363. Nature and Scope of the Issue.

Issue—How Formed.

Procedure Purely Statutory.

§ 352. The methods of bringing the question of the garnishee's liability to issue under the different statutes are very dissimilar; and, inasmuch as the remedy is purely statutory and artificial, and the only authorized mode of conducting it is regulated and defined by statute,¹ it is difficult to give the subject any general treatment. "If a statute gives to a court of record jurisdiction over a new subject, without prescribing the

¹ *Peninsular Stove Co. v. Circuit Judge of Wayne Co.*, 85 Mich. 400, 48 N. W. 549; *Townsend v. Cass Circuit Judge*, 39 Mich. 407; *Maynards v. Cornwell*, 3 Mich. 309; *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398.

mode of proceeding or of trial, it is to be conducted and tried according to the course and forms of the common law. But if a mode of proceeding out of the course of the common law is prescribed, it must be strictly followed.”²

The Affidavit a Declaration—The Answer a Plea.

§ 353. One mode provided is that the affidavit in garnishment shall stand as the plaintiff's declaration against the garnishee whenever either party shall demand an issue and trial of the garnishee's liability,³ and that the disclosure shall be deemed the garnishee's plea,⁴ and that, upon the trial of the issue thus demanded, the affidavit should be deemed denied, except so far as admitted by the disclosure of the garnishee.⁵ When various persons liable to the defendant severally are garnished upon independent writs, founded upon

² Welsh v. Blackwell, 14 N. J. Law, 344, 347; Stewart v. Walters, 38 N. J. Law, 274.

³ How. Ann. St. Mich. § 8068; Sanb. & B. Ann. St. Wis. §§ 2763, 3722; Platt v. Sauk County Bank, 17 Wis. 222; Fearey v. Cummings, 41 Mich. 476, 1 N. W. 946; Bethel v. Linn, 63 Mich. 464, 30 N. W. 84; Imperial Fire Ins. Co. v. Shimer, 96 Ill. 580.

NO FORMAL PLEADING: The issue should be made up without the formality of pleading. Kergin v. Dawson, 6 Ill. 86; Corbin v. Goddard, 94 Ind. 419.

IN WEST VIRGINIA, when the garnishee answers, denying liability, the court may, without formality of pleading, impanel a jury, on the plaintiff's motion, and try the question. Lanham v. Lanham, 30 W. Va. 222, 3 S. E. 273.

IN ILLINOIS, the feigned issue is made up between the defendant and the garnishee. Warne v. Kendall, 78 Ill. 598.

⁴ Sanb. & B. Ann. St. Wis. § 2763; Platt v. Sauk County Bank, 17 Wis. 222.

⁵ How. Ann. St. Mich. § 8068; Bethel v. Linn, 63 Mich. 464, 30 N. W. 84.

the same affidavit, the one affidavit will, under these statutes, serve as a declaration in each of the garnishment suits.⁶

New Declaration or Action against Garnishee.

§ 354. Under other statutes, the garnishee having answered, the plaintiff may file a declaration or supplemental complaint against him, alleging the facts upon which he claims to recover.⁷ A provision somewhat similar in its effect is that the court may make an order allowing the plaintiff to bring an action against the garnishee upon his answer, proceeding in the same manner as in ordinary actions.⁸ In several of the Southern states the statutes provide that, when the

⁶ State Sav. Bank of Detroit v. Circuit Judge of Wayne Co., 95 Mich. 100, 54 N. W. 632.

⁷ Gen. St. Minn. c. 66, § 175; How. Ann. St. Mich. § 8037; Maynards v. Cornwell, 3 Mich. 309; Ruby v. Schee, 51 Iowa, 422, 1 N. W. 741.

SECOND SUMMONS UNNECESSARY: If the plaintiff has recovered a judgment against the principal defendant, he may, under the Michigan justice statute, declare against the garnishee immediately upon his making disclosure, and no summons to show cause is necessary. Elser v. Rommel, 98 Mich. 74, 56 N. W. 1107.

SHOWING FOR PERMISSION TO TAKE ISSUE: The plaintiff is entitled to file a supplemental complaint, under the Minnesota statute, only on permission, and upon a showing of facts to the court. A plain statement that he believes the answer is false is not sufficient. Mahoney v. McLean, 28 Minn. 63, 9 N. W. 76.

⁸ Shahan v. Tallman, 39 Kan. 185, 17 Pac. 823; Exchange Bank v. Gulick, 24 Kan. 359; Secor v. Witter, 39 Ohio St. 218, 231; Parker v. Page, 38 Cal. 522; Hartman v. Olvera, 51 Cal. 501; Lindenthal v. Burke, 2 Idaho; 535, 21 Pac. 419; Vaughan v. Furlong, 12 R. I. 127; West Side Bank v. Pugsley, 47 N. Y. 368; St. Louis, I. M. & S. Ry. Co. v. Richter, 48 Ark. 349, 3 S. W. 56. See, also, post, § 391.

ACTION ON ERRONEOUS ORDER: Failure to give notice, immediately upon filing the answer, that the same is unsatisfactory, and without such notice procuring an order that the property be paid

plaintiff is not satisfied with the garnishee's disclosure, he shall file an affidavit stating that he believes the answer to be untrue or incorrect, and thereupon a feigned issue is formed, under the direction of the court, to try the question of the garnishee's liability.⁹ The direc-

into court, and on such order bringing an action, which is afterwards dismissed, was held not to prevent the plaintiff suing on the answer. *Exchange Bank v. Gulick*, 24 Kan. 359. As to the procedure under the Kansas justice court act, see *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366.

ORDER ESSENTIAL: No action can be sustained unless the proper order authorizing it to be brought has been entered. *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857.

IN WASHINGTON, the court makes an order that the principal defendant bring an action against the garnishee, for the benefit of the plaintiff, to test the question of the garnishee's liability. *Everton v. Parker*, 3 Wash. 331, 28 Pac. 536.

⁹ *Myatt v. Lockhart*, 9 Ala. 91; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Ables v. Miller*, 12 Tex. 109; *Adkins v. Watson*, Id. 199; *Ellison v. Tuttle*, 26 Tex. 283; *Phoenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825; *Empire Car-Roofing Co. v. Macey*, 115 Ill. 399, 3 N. E. 417; *Hurd's Rev. St. Ill. c. 62, § 7*.

IN COLORADO, the plaintiff's declaration is an affidavit controverting the answer of the garnishee, and is deemed denied without any rejoinder, and the issue thus formed is tried as in other cases. *Code Colo. 1887, § 128*; *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997.

AFFIDAVIT THAT ANSWER IS INCORRECT: In Alabama the affidavit may be made by the attorney for the plaintiff. *Faulks v. Heard*, 31 Ala. 516; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317. But in Texas it must be made by the plaintiff himself. *Givens v. Taylor*, 6 Tex. 315.

The affidavit need not set up sufficient facts to authorize a recovery against the garnishee in an ordinary suit. *Phoenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825, 829. All that is necessary is an affidavit of the incorrectness of the answer. *Marston v. Carr*, 16 Ala. 325; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Empire Car-roofing Co. v. Macey*, 115 Ill. 399, 3 N. E. 417.

Without this it is fatally defective. *Truitt v. Griffin*, 61 Ill. 26. If the plaintiff does not stop there, but proceeds to set up facts by

tion which the court can exercise in making up this issue relates to the form of the issue only. It can give no direction as to what the allegations shall be.¹⁰ Still another method of disposing of the question is by scire facias against the garnishee to show cause why judgment should not be rendered against him.¹¹

Irregularities are Waived by Going to Trial.

§ 355. Whatever is the authorized practice in framing the issue, all irregularities are waived by taking part in the subsequent proceedings without objecting that the issue has not been properly framed.¹² For

which he seeks to charge the garnishee, he thereby renders the affidavit insufficient, when the facts stated are not such as show that the garnishee is chargeable. *Donald v. Nelson*, 95 Ala. 111, 10 South. 317.

AN UNVERIFIED TRAVERSE is, under these statutes, fatally defective. *Brake v. Curd-Sinton Manuf'g Co. (Ala.)* 14 South. 773.

But the plaintiff's subsequent allegations in forming the issue need not be under oath, unless the statute requires it. *Phoenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825, 829.

¹⁰ *Lindsay v. Morris*, 100 Ala. 546, 13 South. 619. *Phoenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825.

¹¹ *Tweedy v. Nichols*, 27 Conn. 518; *Guptill v. Ayer*, 149 Mass. 49, 20 N. E. 449; *Egbert v. Hawk*, 12 N. J. Eq. 80. See, also, ante, § 316.

¹² *Imperial Fire Ins. Co. v. Shimer*, 96 Ill. 580; *Kirby v. Corning*, 54 Wis. 599, 12 N. W. 69.

TRIAL WITHOUT ISSUE: "There was no traverse of this allegation, and no issue formed upon such notice, as required by statute; but, testimony having been introduced by the defendant to prove the fact stated in the notice, without any issue being formed, such irregularity was waived." *Singer v. Townsend*, 53 Wis. 126, 226, 10 N. W. 365.

"It seems that appellant [garnishee] entered into the trial without making any objection on account of the failure of the appellee to file a controverting affidavit, and without taking any steps to have formal issues made. * * * Appellee did not controvert any of the statements made in the answer, and he therefore could not have sworn

example, it has been held that the issue may be made up orally if neither party requires it to be in writing, and after proceeding to trial upon the issue thus formed neither party can object.¹³ Again, it was held, in Nebraska, under a statute providing for an action against the garnishee in case his answer is unsatisfac-

that the answer of the garnishee was not correct. The failure to form the issues before entering upon the trial, however, presents a more difficult question. It has been held that our statute, in such cases, does not require formal pleadings. * * * Appellant, having gone through the trial without objecting to the manner of proceeding, should not now be heard to complain that the record fails to show that the necessary issues were made. It was as much his duty to show that the necessary issues were formed as it was that of his adversary." *Swearingen v. Wilson*, 2 Tex. Civ. App. 157, 21 S. W. 74.

¹³ *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380; *Swearingen v. Wilson*, 2 Tex. Civ. App. 157, 21 S. W. 76. But see *Roberts v. Barry*, 42 Miss. 260.

A garnishee moved the court to dismiss the proceedings had to contest his answer on the grounds (1) that the affidavit for the same did not state that the answer was untrue; (2) that no issue was tendered in the time and manner provided by statute. The court overruled the motion, and the garnishee appealed to the supreme court, which affirmed the action of the lower court, and, after reciting the facts, proceeded as follows: "The attorney for the plaintiff stated [at the trial] that the said garnishee, at the time of said garnishment, and at the time the answer was made, had money belonging to the defendant amounting to \$113.50. The attorney for the garnishee then stated that the said garnishee did not have, at the time of the service of said garnishment, or at the time of making said answer, \$113.50 belonging to the defendant. Thus an issue was tendered by the plaintiff, and accepted and joined in by the garnishee. This was a waiver by the garnishee of the several irregularities in respect of the time when the affidavit of contest was filed, the insufficiencies of that affidavit, etc., alleged in the motion made by the garnishee after the issue was made up; and the court did not err in denying those motions, even if it be conceded that they were absolutely meritorious." *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520.

tory, that if the garnishee departs from the special statutory proceeding by filing an answer in the form of answers filed in civil actions, and the plaintiff thereupon files a reply, denying each and every allegation contained in the answer, and upon the issue thus formed the parties proceed to trial without objection, the garnishee cannot complain of the irregularity to obtain a reversal of the judgment rendered against him on such trial.¹⁴ But, in Oregon, it was held that the written allegations and interrogatories which the statute provides that the plaintiff shall serve upon the garnishee are in the nature of a complaint, and, where they are not served, no valid judgment can be rendered against the garnishee, though he waive the omission.¹⁵

Notice of Taking Issue on the Answer of the Garnishee.

§ 356. Unless the statute requires a formal demand of issue upon the answer, none is necessary, and noticing the issue for trial is a sufficient intimation to the garnishee that the statutory issue is taken.¹⁶ It is the garnishee's duty to take notice of all that is done in the case at the term of court at which his answer is made, and therefore no notice need be served on him of a demand of issue made by the plaintiff at that term, when the statute does not expressly require it;¹⁷ but,

¹⁴ *Burlington & M. R. Ry. Co. v. Chicago Lumber Co.*, 18 Neb. 303, 25 N. W. 94.

¹⁵ *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104.

¹⁶ *Platt v. Sauk County Bank*, 17 Wis. 222.

¹⁷ *Cross v. Spillman*, 93 Ala. 170, 9 South. 362; *Security Ass'n v. Weems*, 59 Ala. 588; *Chase v. Foster*, 9 Iowa, 429; *Mandeville v. Askew*, 78 Ga. 18.

if the issue is not taken till a subsequent term, he is entitled to notice.¹⁸

Specific Allegations—How Far Required.

Show Nature of Claim, and State Cause of Action.

§ 357. Of course, the garnishee is interested to have the issue made specific enough to enable him to prepare his defense,¹⁹ and it has been held that this is the test of sufficiency;²⁰ but it is said by other courts that the plaintiff must allege everything necessary to make the record show a complete defense for the garnishee to any future action by the defendant.²¹ Again, it is said that the plaintiff must allege the facts with sufficient particularity that a definite issue can be formed thereon.²² In some courts the test of sufficiency is

¹⁸ Lockhart v. Johnson, 9 Ala. 223; Kienne v. Anderson, 13 Iowa, 565. Contra, Chase v. Foster, 9 Iowa, 429.

Appearance without notice is a waiver of the want of it. Kienne v. Anderson, *supra*.

Held, that this notice must be served on the garnishee personally, and not on his attorney. Carter v. Koshland, 12 Or. 492, 8 Pac. 556.

¹⁹ Fowler v. Williamson, 52 Ala. 16; Welsh v. Blackwell, 14 N. J. Law, 344; Tim v. Franklin, 87 Ga. 93, 13 S. E. 259.

The words "rights and credits" are not sufficiently specific on scire facias. The writ should specify the nature of the property. Neal v. Cook, 10 N. J. Law, 337.

ARGUMENTATIVE AND DESULTORY AVERMENTS, presenting no direct issue on the truth of the answer, should be stricken out on motion, as insufficient. Sanders v. Miller, 60 Ga. 554.

²⁰ Adkins v. Watson, 12 Tex. 199; Phoenix Ins. Co. of Brooklyn v. Willis, 70 Tex. 12, 6 S. W. 825.

²¹ Lomerson v. Hoffman, 24 N. J. Law, 674. Compare Tyler v. Coolbaugh, 7 Iowa, 474.

²² NATURE AND AMOUNT OF LIABILITY—AMENDMENTS: "This requirement manifestly intends that the tender shall allege a state of facts showing a liability on the part of the garnishee to the

that the allegations state a cause of action in favor of the defendant against the garnishee.²³ If he is required to make such allegations as the defendant would have to make to enable him, as plaintiff, suing on the demand, to maintain an ordinary action against the garnishee, there is no good reason why he should be asked to do more, and this has generally been considered to be the limit of what can be demanded of him; ²⁴ but that much is not always required.²⁵ From the very nature of the controversy, the plaintiff cannot, and therefore should not, be required to plead facts with the same particularity as in actions be-

defendant, or possession of property by the garnishee belonging to the defendant, and that these facts shall be so stated that a definite issue can be joined thereon. * * * There was a tender of issue filed, general in form, which alleged that the garnishees were indebted to the defendant, or did have property in their hands belonging to him. This tender is clearly insufficient under the present statute, in that it does not set forth the amount of the indebtedness, or nature thereof, or how evidenced, nor does it set forth what property of the defendant the garnishees have in their possession. But, though defective in these particulars, it was not frivolous on its face. It would have been sufficient to try the case upon, if not objected to. It was capable of amendment, so as to cure the omissions." *Lindsay v. Morris*, 100 Ala. 546, 13 South. 619.

²³ *Everton v. Parker*, 3 Wash. St. 331, 28 Pac. 536; *Case v. Noyes*, 16 Or. 329, 19 Pac. 104.

²⁴ *Cockrill v. Mize* (Ky.) 12 S. W. 1040; *Groschke v. Bardenheimer*, 15 Mo. App. 353.

²⁵ *Empire Car-Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417; *Turner v. Rosseau*, 21 Ga. 240; *Phoenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 6 S. W. 825.

When the answer consists of a general denial, followed by specific matter, the plaintiff may take issue on the general answer without filing interrogatories to clear up the specific matter. *Bebb v. Preston*, 3 Iowa, 325; *Hobson v. Kelly*, 87 Mich. 187, 49 N. W. 533. Compare *Myatt v. Lockhart*, 9 Ala. 91.

tween parties who have personal knowledge of all the facts involved.²⁶ The garnishee must be supposed to have a better knowledge of the dealings between himself and the defendant than the plaintiff has.²⁷ It has been generally held that it is not necessary to allege that a holding of the garnishee is fraudulent in order to prove the fact,²⁸ and certainly it is not necessary to allege that judgment has been recovered in the main action, for that appears by the record, and need not be proved.²⁹

Proof of Facts not Alleged—Amendments.

§ 358. When the plaintiff does set out the facts upon which he bases his claim to have the garnishee charged, thus presenting an issue of fact, he cannot depart therefrom, and ask recovery upon grounds not pleaded,³⁰ unless, in the exercise of its discretion, the court allows him to amend his pleadings,³¹ which, in a proper case, it will do, even after an appeal.³²

²⁶ *Ruby v. Schee*, 51 Iowa, 422, 1 N. W. 741.

²⁷ *Strong v. Hollon*, 39 Mich. 411.

BILL OF PARTICULARS: Held, that the garnishee is not entitled, as a matter of right, to a bill of particulars of what the plaintiff seeks to establish. *Id.*

²⁸ *Davis v. Mendenhall*, 19 Minn. 113, 128; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946; *Cummings v. Fearey*, 44 Mich. 39, 6 N. W. 98; *Joseph v. People's Sav. Bank*, 132 Ind. 39, 31 N. E. 524; *E. B. Miller & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. 379. *Contra*, *Freese v. Co-operative Coal Co.*, 67 Iowa, 42, 24 N. W. 583.

²⁹ *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587.

³⁰ *Freese v. Co-operative Coal Co.*, 67 Iowa, 42, 24 N. W. 583; *Britt v. Bradshaw*, 18 Ark. 530.

³¹ *Butman v. Hobbs*, 35 Me. 227; *Sears v. Thompson*, 72 Iowa, 61, 33 N. W. 364; *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587.

³² *Bebb v. Preston*, 3 Iowa, 325; *Lomerson v. Hoffman*, 24 N. J. Law, 674.

Attacking Insufficient Allegations.

§ 359. The pleadings in making this issue may be attacked in the same manner as other pleadings,³³ and defects therein are, in the same manner, cured by not raising the objection in season and in a proper manner.³⁴ A tender of issue not being frivolous on its face, the proper practice is by demurrer to show in what particulars the averments are defective and insufficient, thus giving the plaintiff notice of what the objections are, and opportunity to obviate them by amendment, which are not afforded by a general motion to strike from the files.³⁵

When Issue may be Taken on the Answer.*Reasonable Time—Statutory Period.*

§ 360. If the plaintiff desires to contest the garnishee's answer, he must take issue upon it within a reasonable time after it is made; and what is a reasonable time will depend largely upon the facts of each case.³⁶ When the time allowed the plaintiff to contest

³³ McDonald v. Moore, 65 Iowa, 171, 21 N. W. 504; Ruby v. Schee, 51 Iowa, 422, 1 N. W. 741; Bates v. Forsyth, 64 Ga. 232; Corbin v. Goddard, 94 Ind. 419.

³⁴ Ruby v. Schee, 51 Iowa, 422, 1 N. W. 741; Dawson v. Maria, 15 Or. 556, 16 Pac. 413.

³⁵ Lindsay v. Morris, 100 Ala. 546, 13 South. 619.

But held, that the proper practice in such case is to move to dismiss the proceedings, and not by demurrer. Tuttle v. Gordon, 8 Mo. 152.

Under a statute directing that the garnishee plead within a certain time after summons served on him in scire facias, held, that a demurrer is improper. Welsh v. Blackwell, 14 N. J. Law, 344; Lomerson v. Hoffman, 24 N. J. Law, 674.

³⁶ Smith v. Wellborn, 73 Ga. 131.

If the plaintiff does not take issue upon the answer, or move for
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the answer is fixed by statute, the garnishee cannot be compelled to join in an issue tendered at a subsequent time, unless he has expressly or by implication waived the delay, or unless the court, before the period expires, grants the plaintiff further time within which the contest may be instituted.³⁷ But an issue taken in season may be made up at a subsequent time, or, at least, it is not error for the court to permit it to be done;³⁸ and proceeding on the issue framed is a waiver of the delay in taking it.³⁹ Under a statute requiring the plaintiff to take issue at the term when the answer is filed, unless the court grant further time, the supreme court of Mississippi affirmed the action of the trial court in refusing an application for leave to traverse the garnishee's answer at a subsequent term, saying: "We feel constrained to enforce the plain requirement of the statute as we find it written. * * *

It seems altogether right that the plaintiff should give attention to his demand on a stranger to his litigation, and, by timely action, put it in the garnishee's power to be at once discharged from his compulsory, perhaps needless, attendance upon a court in which he is not a suitor. The letter of the law and its spirit, in this instance, are in perfect harmony, and we can ingraft no

judgment upon it within a reasonable time, the garnishee is entitled to be discharged on motion. *Selz v. First Nat. Bank of Ft. Atkinson*, 55 Wis. 225, 12 N. W. 433.

³⁷ *Brake v. Curd-Sinton Manuf'g Co.*, 102 Ala. 339, 14 South. 773; *Cross v. Spillman*, 93 Ala. 170, 9 South. 362; *Lockhart v. Johnson*, 9 Ala. 223; *Graves v. Cooper*, 8 Ala. 812.

³⁸ *Lindsay v. Morris*, 100 Ala. 546, 13 South. 619; *Marston v. Carr*, 16 Ala. 325.

³⁹ *Pedrick v. McCall*, 80 Ga. 491, 5 S. E. 633; *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520.

exception on it.”⁴⁰ We find a similar decision in Oregon, in which the court express a doubt as to the power of the court to enlarge the time.⁴¹

Taking Issue after Time Limited.

§ 361. Somewhat opposed to these decisions, allowing issue to be taken only within the time limited therefor, except when the delay is waived or further time is granted, we find decisions to the effect that issue may be taken at a subsequent term by permission of court, and this permission, being an exercise of discretion, cannot be reviewed by the supreme court.⁴² A certain time being allowed the plaintiff in which to take issue upon the separate answers of several garnishees, and he having within the prescribed time filed a pleading joining all the garnishees, and thereby taking issue on all the answers, and one of the garnishees having been dismissed from the issue thus taken because of such misjoinder, and the plaintiff having immediately thereupon filed a pleading taking issue upon the answer of this garnishee alone, it was held that the court erred in striking this last pleading from the files on the ground that it came too late.⁴³

After Judgment or Motion for Judgment.

§ 362. When the garnishee appeared March 16th, at the term at which he was summoned, and filed his answer denying indebtedness, and on March 26th, during the same term, the court, after excusing attend-

⁴⁰ Consumers' Ice Co. v. Cook Well Co., 71 Miss. 886, 16 South. 259.

⁴¹ Case v. Noyes, 16 Or. 539, 21 Pac. 46.

⁴² Vincent v. Wellington, 18 Wis. 159. Compare Banks v. Hunt, 70 Ga. 741.

⁴³ Coffman v. Ford, 56 Iowa, 185, 9 N. W. 118.

ance of all counsel in civil cases, took up the garnishment out of its order, on motion of the garnishee, and, ascertaining that no traverse had been filed, granted an order discharging the garnishee, and on the same day took a recess till April 30th, at which time plaintiff's counsel first learned that the garnishee had been discharged, it was held to be no abuse of discretion by the court then to set aside the discharge, and allow the plaintiff to traverse the garnishee's answer.⁴⁴ But, after the plaintiff has moved for judgment against the garnishee on the answer, and the court has overruled his motion, it is then too late to take issue on the answer.⁴⁵ So, too, a plaintiff in justice court, having failed to deny the answer of the garnishee within the time provided by statute, is not entitled, as a matter of right, to make such denial in circuit court on appeal; and it is not error for the circuit court to refuse the plaintiff leave to file a denial, or to strike out such a denial after leave has been given to file it.⁴⁶ After a judgment against the garnishee upon an answer denying liability was set aside by the supreme court, the plaintiff asked to have the same remanded to the lower court to enable him to take issue on the answer; but

⁴⁴ *McWilliams v. Standard Guano & Chemical Co.*, 92 Ga. 437, 17 S. E. 669.

When a case was continued over one term, and not set for trial at the next, at which time the garnishee filed his answer, and was discharged, of which discharge the plaintiff was not informed till the next succeeding term, it was held not error to refuse, then, to set aside the discharge, and allow the plaintiff to contest the answer, on proof that the want of prosecution was due to the neglect of an attorney, not in the case, whom the plaintiff had requested to attend to it. *Dunham v. Murphy* (Tex. Civ. App.) 28 S. W. 132.

⁴⁵ *Mahoney v. McLean*, 28 Minn. 63, 9 N. W. 76.

⁴⁶ *Blackstone v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 555.

the court held that this should have been done in the first instance, and denied the motion.⁴⁷

Nature and Scope of the Issue.

§ 363. Ordinarily, the issue is whether the garnishee is chargeable upon any ground upon which the plaintiff, in instituting the proceedings, attempted to charge him, and is not confined to the matter contained in the garnishee's answer.⁴⁸ The plaintiff may show that the garnishee is chargeable by reason of facts denied or not mentioned in the disclosure.⁴⁹ But an independent cause of action by the plaintiff against the garnishee cannot be set up,⁵⁰ nor a liability different in nature from any to which the garnishee was summoned to answer.⁵¹ Whether purely equitable issues can be tried in this proceeding is not agreed.⁵²

⁴⁷ McCoy v. Williams, 6 Ill. 584, 593, note at end of case.

⁴⁸ Sears v. Thompson, 72 Iowa, 61, 33 N. W. 364.

The garnishee having made a general denial of liability and a specific disclosure, held, that the plaintiff may take issue on the general denial merely, without filing interrogatories concerning the specific matter. Bebb v. Preston, 3 Iowa, 325.

A garnishee having disclosed that he was indebted in a certain sum unless the debt became discharged by facts set up, the plaintiff may take issue on the answer without filing special interrogatories; and the issue is, was such indebtedness actually due? Hobson v. Kelly, 87 Mich. 187, 49 N. W. 533.

The only proper issue is one of indebtedness *vel non*, and the plaintiff cannot select a part of the answer upon which to take issue. Myatt v. Lockhart, 9 Ala. 91; Perea v. Colorado Nat. Bank (N. M.) 27 Pac. 322.

⁴⁹ Davis v. Mendenhall, 19 Minn. 149; Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946.

⁵⁰ Sears v. Thompson, 72 Iowa, 61, 33 N. W. 364.

⁵¹ Botsford v. Simmons, 32 Mich. 352; Mitchell v. Shelton, 35 Conn. 1; Frizzel v. Willard, 37 Ark. 478. See, also, ante, § 50.

⁵² See ante, § 153.

CHAPTER XVII.**TRIAL OF THE ISSUE BETWEEN THE PLAINTIFF AND THE GARNISHEE.**

- § 364. Time for Trial—Whether before Judgment in Main Action.
365. — Garnishee's Right to Speedy Trial.
366. — Either Party may Notice for Trial.
367. Manner of Trial—By Court, Same as in Other Actions.
368. — Right to Trial to Jury.
369. What Plaintiff must Prove—Has Burden to Show Liability of Garnishee, Its Nature and Amount.
370. — Need not Prove What Appears of Record in Proceedings or Main Action Unless Alleged.
371. Competency of Evidence and Witnesses—Evidence Confined to Issue.
372. — Evidence for Plaintiff.
373. — Evidence for Garnishee.
374. The Defense—Defendant and Claimants cannot Take Part in.
375. — Garnishee may Question Proceedings in Main Action, and Protect Claimants.
376. — Irregularities—Statute of Limitations—Failure of Consideration—Equitable Defenses.
377. — Agreements within Statute of Frauds.
378. — May Prove Set-Off or Recoupment as if Sued by Defendant.
379. — Various Rules as to What Demands may be Set Off.
380. — After-Acquired Claims—Burden of Proof—Intention to Claim against Defendant.
381. — Matters in Abatement of Action.
382. — Only the Judgment can Terminate the Action.

Time for Trial.

Whether before Judgment in Main Action.

§ 364. Usually no trial of the garnishee's liability can be had till judgment has been recovered in the

principal suit,¹ unless the principal defendant has never been served with process, and jurisdiction to render judgment in the main action therefore depends upon the liability of the garnishee.² What is here said relates to the right of the plaintiff to force the garnishment issue on for trial. Although the garnishee may waive his right to time and notice,³ yet, if he objects, he cannot, after judgment in the main action, be compelled to go to trial * upon a shorter notice than is allowed him by law; but, on

¹ Gen. St. Minn. 1894, § 5321; *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588; *Strong v. Hollon*, 39 Mich. 411; *Farrington v. Sexton*, 43 Mich. 454, 5 N. W. 654; *Streisguth v. Reigelman*, 75 Wis. 212, 43 N. W. 1116.

² *Wilson v. Bank of Louisiana*, 55 Ga. 98.

If jurisdiction depends on property of the defendant subject to garnishment being in the hands of the garnishee, the fact that such property exists must be found before the suit in attachment can proceed to final judgment. *Myers v. Smith*, 29 Ohio St. 120. In such cases, jurisdiction to render judgment against the defendant depends upon a judgment against the garnishee. *Byers v. Baker* (Ala.) 16 South. 72.

In Michigan no trial can be had against the garnishee in this or any other case till judgment against the defendant. *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801.

³ *Crippen v. Fletcher*, 56 Mich. 386, 23 N. W. 56.

⁴ *Crippen v. Fletcher*, 56 Mich. 386, 23 N. W. 56; *Everton v. Parker*, 3 Wash. 331, 28 Pac. 536.

PLAINTIFF MAY DEMAND TRIAL BEFORE JUDGMENT IN MAIN ACTION: "When the jury finds that the answer is not true, and declares in its verdict that he is indebted, or had effects in his hands at the time he is garnished, and the plaintiff moves to enter up judgment against the garnishee, the court can then inquire whether the plaintiff has a judgment against the defendant or not. Up to that time he is not interested or concerned in the matter, because, if he is not indebted, or has no effects of the defendant in his hands, it does not matter to him whether there is a judgment in favor of the plaintiff against the defendant or not." *Merchants' &*

the other hand, he cannot be compelled to stand by till the main action is disposed of before having the trial of his own liability. "He may dispute his liability, and want an early determination of that matter, which it is apprehended he may demand without awaiting the issue between plaintiff and defendant; he being a mere stakeholder, not interested in that issue. Can he be kept in suspense and danger?"⁵

Garnishee's Right to Speedy Trial.

§ 365. It is held that the statutes contemplate speedy proceedings, that the plaintiff cannot tie up the property in the hands of the garnishee indefinitely; and, if he does not move in the case within the time required by law, the garnishees may object to any further proceedings against him, unless there had been an order continuing the case,⁶ or the garnishee has waived the delay.⁷ Or may have the case dismissed for want of prosecution.⁸

Manufacturers' Nat. Bank v. Haiman, 80 Ga. 624, 5 S. E. 795; *Capital City Bank v. Wakefield*, 83 Iowa, 46, 48 N. W. 1059.

⁵ *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548.

⁶ *Blake v. Hubbard*, 45 Mich. 1, 7 N. W. 204.

Held, that the intervening of one or more terms between the service of the garnishment process and the rendition of judgment against the garnishee does not imply an abandonment of the proceedings. *Phillips v. Germon*, 43 Iowa, 101. The fact that no jury was summoned for a term of court excuses not trying the case at that term, and the pending of the cause for 15 months will not of itself warrant the dismissal of the proceedings if the garnishee does not raise the question of laches. *Webber v. Bolte*, 51 Mich. 113, 16 N. W. 257.

A delay of 14 years in bringing scire facias against the garnishee held excused. *Cookson v. Turner*, 2 Bin. (Pa.) 453. See, also, post, § 382.

⁷ Applying for and receiving an attorney fee as cost of the con-

⁸ *Dunham v. Murphy* (Tex. Civ. App.) 28 S. W. 132.

Either Party May Notice for Trial.

§ 366. Another view of the matter is that, while the garnishee has the power and the undoubted right to have a speedy disposition of the cause, he need not wait the motion of the plaintiff, and, if neither party sees fit to move the cause for trial, there is no hardship in permitting it to stand over.⁹

Manner of Trial.

By Court, Same as in Other Actions.

§ 367. The issue between the plaintiff and the garnishee being formed and ready is brought on for trial¹⁰ and tried in the same manner as ordinary ac-

tinuance is a waiver. *Kiely v. Bertrand*, 67 Mich. 332, 34 N. W. 674.

Noticing a case for trial at a subsequent term, and in that term consenting that the case be continued, is a waiver. Having waived the statutory rights, the case must thereafter proceed as other issues of fact, subject to notice by either party. *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. 1009.

When the attorney for the garnishee moved that the case be dismissed for want of diligence in its prosecution, the plaintiff's counsel objected that, if the garnishee had a right to make the motion, he had forfeited it by consenting that "the case stand from day to day, and not be taken up for trial before," etc., which statement was not contradicted. Held, that the motion was properly overruled. *Meigs v. Weller*, 90 Mich. 629, 51 N. W. 681.

Failure to continue the garnishee case by order of court does not discharge the garnishee. He is liable till discharged, and payment meantime is at his peril. *Hughes v. Monty*, 24 Iowa, 499.

⁹ *Vincent v. Wellington*, 18 Wis. 159; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548. Compare *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. 1009.

¹⁰ **DOCKETING SEVERAL GARNISHMENTS:** When several persons are summoned as individual garnishees, the correct practice is to docket separate suits against each, so that the separate

tions,¹¹ unless the statute specially provides otherwise.¹² The garnishee is entitled to his day in court,¹³ and a judge of the court could no more try the garnishee's liability in vacation, and render judgment thereon against him, than he could in the same manner try any other action.¹⁴

Right to Trial to Jury.

§ 368. Whether either party is entitled to a jury trial in the absence of a statute upon the subject specially mentioning garnishment trials depends upon the nature of the matter to be tried. If the issue to be tried is of such a nature as to be within the scope of the constitutional provision securing the right to trial by jury as at common law, a jury may be demanded of right, although not provided for by the

garnishments may be proceeded with independently; and the plaintiff is entitled to have this done upon proper showing on motion. *Farmers' Bank of Virginia v. Brooke*, 40 Md. 249. On same subject, see, also, post, § 395.

¹¹ *Elwood v. Crowley*, 64 Iowa, 68, 19 N. W. 857; *Beck v. Cole*, 16 Wis. 99; *Graves v. Cooper*, 8 Ala. 811.

The proceeding upon the trial has ceased to be a mere summary proceeding. It is, then, a trial subject to trial rules. *Dawson v. Iron Range & H. B. Ry. Co.*, 97 Mich. 33, 45, 56 N. W. 106.

¹² *Field v. Shoop*, 6 Ill. App. 445.

"If a statute gives to a court of record jurisdiction over a new subject, without prescribing the mode of proceeding or of trial, it is to be conducted and tried according to the course and forms of the common law. But if a mode of proceeding out of the course of the common law is prescribed, it must be strictly followed." *Welsh v. Blackwell*, 14 N. J. Law, 344, 347; *Stewart v. Walters*, 38 N. J. Law, 274.

¹³ *Lindenthal v. Burke*, 2 Idaho, 535, 21 Pac. 419.

¹⁴ *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. 294.

garnishment statutes; otherwise not.¹⁵ If the garnishee is entitled to a jury, he may waive it.¹⁶

What the Plaintiff must Prove.

Has Burden to Show Liability of Garnishee, Its Nature and Amount.

§ 369. There is no presumption that the garnishee was liable. His liability must be made to appear by his disclosure or otherwise.¹⁷ The burden rests upon the plaintiff to prove by a preponderance of evidence

¹⁵ *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 399, 43 N. W. 153; *Delaney v. Hartwig* (Wis.) 64 N. W. 1035; *Weibler v. Ford* (Minn.) 63 N. W. 1075; *Kelley v. Andrews* (Iowa) 62 N. W. 853; *Cooley*, Const. Lim. (6th Ed.) 504, note 2.

The garnishee was held entitled to a jury trial in the following cases: *Cahoon v. Lavy*, 5 Cal. 294; *Boozar v. Fuller*, 88 Ia. 295, 14 S. E. 615; *Everton v. Parker*, 3 Wash. St. 311, 28 Pac. 536; *Perea v. Colorado Nat. Bank of Texas* (N. M.) 27 Pac. 322.

¹⁶ *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587.

¹⁷ *Union Pac. Ry. Co. v. Gibson*, 15 Colo. 299, 25 Pac. 300; *Smith v. Clarke*, 9 Iowa, 241; *Morse v. Marshall*, 22 Iowa, 290; *Church v. Simpson*, 25 Iowa, 408; *Farwell v. Howard*, 26 Iowa, 381; *Letts, Fletcher & Co. v. McMaster*, 83 Iowa, 449, 49 N. W. 1035; *Birt-whistle v. Woodward*, 95 Mo. 113, 7 S. W. 465; *Hamilton v. Hill*, 86 Me. 137, 29 Atl. 956; *Taylor v. Huey*, 166 Pa. St. 518, 31 Atl. 199; *Wile v. Cohn*, 63 Fed. 759; *Edney v. Willis*, 23 Neb. 56, 36 N. W. 300; *Timm v. Stegman*, 6 Wash. 13, 32 Pac. 1004; *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. 65; *Fleming v. Baxter* (Colo. App.) 38 Pac. 57.

A person summoned as garnishee is to be charged or not, according as, on a just view of all the facts, the weight of evidence shall fairly preponderate; and if it is not affirmatively proved by the answer of the garnishee, or by other evidence, that he is chargeable, then he is to be discharged. *Porter v. Stevens*, 9 Cush. (Mass.) 530; *Kelley v. Weymouth*, 68 Me. 107.

CONFESSION AND AVOIDANCE: As to the rule when the garnishee answers by way of confession and avoidance, see ante, § 315.

all the facts upon which he relies to charge the garnishee.¹⁸ And if he fails in this the garnishee must be

¹⁸ Dawson v. Iron Range & H. B. Ry. Co., 97 Mich. 33, 56 N. W. 106; East Line & R. R. Co. v. Terry, 50 Tex. 129; Scheuber v. Simmons, 2 Tex. Civ. App. 672, 22 S. W. 72; Kergin v. Dawson, 1 Gilman (Ill.) 86; Rippen v. Schoen, 92 Ill. 229; Laschear v. White, 88 Ill. 43; Williams v. Young, 46 Iowa, 140; Padden v. Moore, 58 Iowa, 703, 12 N. W. 724; Reagan v. Pacific R. Co., 21 Mo. 30; Sevier v. Throckmorton, 33 Ala. 212; Caldwell v. Coates, 78 Pa. St. 312; Denver, T. & Ft. W. Ry. Co. v. Smeeton, 2 Colo. App. 126, 29 Pac. 815; Thomas v. Sturges, 32 Miss. 261; Williams v. Housel, 2 Iowa, 154; Wright v. Foord, 5 N. H. 178; Lomerson v. Hoffman, 24 N. J. Law, 674, 25 N. J. Law, 625.

BURDEN OF PROOF—ILLUSTRATIONS: "It is a general rule, and one applicable to this case, that wherever, in consequence of the nature of the subject, it is a matter of absolute indifference whether a given state of facts does or does not exist, the party who grounds his claim or defense upon its existence must remove that indifference in order to succeed; and meanwhile the opposite party may safely remain passive, and insist upon a determination in his own favor if that is not done." Hewitt v. Wagar Lumber Co., 38 Mich. 701.

The plaintiff must prove that the garnishee's creditor is the principal defendant. Field v. Malone, 102 Ind. 251, 1 N. E. 507. If the garnishee in his answer states that the property in his hands, or the debt due from him, is exempt from garnishment, the plaintiff must disprove it in order to recover. Todd v. McCravey, 77 Ala. 469; Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 651, 57 N. W. 1050.

When the statute allowed judgment by default to be entered against the garnishee "as in ordinary cases," held, that no judgment can be entered without proof, the same as if he were an ordinary defendant. Flanagan v. Earnest, 1 Chand. (Wis.) 149; Longwell v. Hartwell, 164 Pa. St. 533, 30 Atl. 495. See, also, post, § 387.

When a case is submitted on the disclosure alone, the court cannot make a finding of fact outside of it. Wilder v. Ferguson, 42 Minn. 112, 43 N. W. 794. See ante, § 314. Likewise if the garnishee's testimony is undisputed, though his written answer is

discharged.¹⁹ A statute providing that if the plaintiff fail to make out a case against all the defendants he shall nevertheless recover against such as he shows to be liable, applies to suits against the garnishees.²⁰ The plaintiff must also prove the amount of the garnishee's liability,²¹ and should, when necessary, ask for such special findings as will determine it.²²

Need not Prove What Appears of Record in Proceedings or Main Action Unless Alleged.

§ 370. But ordinarily no formal proof of the existence of the judgment or proceedings against the prin-

found untrue. *Dieter v. Smith*, 70 Ill. 168; *Cairo & St. L. Ry. Co. v. Killenberg*, 82 Ill. 295.

If there is any evidence to support the finding, the court will not disturb it. *Spencer v. Moran*, 80 Iowa, 374, 45 N. W. 902.

¹⁹ *Sanders v. Miller*, 60 Ga. 554; *Gordin v. Moore*, 62 Miss. 493; *Laschear v. White*, 88 Ill. 43; *Cairo & St. L. Ry. Co. v. Killenberg*, 92 Ill. 142; *Givens v. Taylor*, 6 Tex. 315.

²⁰ *Hawley v. Atherton*, 39 Conn. 309; *First Nat. Bank of Cleburne v. Graham* (Tex. App.) 22 S. W. 1102.

²¹ *Watson v. Montgomery* (Tex. App.) 16 S. W. 546; *Peor v. Colborn*, 57 Pa. St. 415; *Bonraffon v. Thompson*, 83 Pa. St. 460; *Longwell v. Hartwell*, 164 Pa. St. 533, 30 Atl. 495; *Keppel v. Moore*, 66 Mich. 292, 33 N. W. 499; *Meigs v. Weller*, 90 Mich. 629, 51 N. W. 681; *Marks v. Reinberg*, 16 La. Ann. 348; *Perea v. Colorado Nat. Bank of Texas* (N. M.) 27 Pac. 322; *First Nat. Bank v. Perry*, 29 Iowa, 266; *Brailard v. Simmons*, 67 Iowa, 646, 25 N. W. 844.

But when it is shown that the garnishee's liability exceeds the amount of the plaintiff's judgment against the principal defendant, it is immaterial to inquire further, for that fixes the limit of the plaintiff's recovery. *Strong v. Hollon*, 39 Mich. 411; *Crane v. Stickles*, 15 Vt. 252. *Contra*, *Perea v. Colorado Nat. Bank of Texas*, above.

²² SPECIAL FINDINGS—GENERAL VERDICT: When it is sought to charge the garnishee as holding property belonging to the defendant, the plaintiff should submit at least two special questions

cipal defendant or the fact of garnishment is required in the trial of the issue against the garnishee, for the reason that the garnishment proceedings are ancillary to the suit in which the judgment was rendered. The fact of the pendency of that suit is already before the court,²³ and it is at liberty to consider the record without proof.²⁴ But when the affidavit or writ of garnishment or any other jurisdic-

to the jury: "(1) What property do you find to have been in the possession or under the control of the defendant at the time of the service of the writ of garnishment upon him, for which, under the evidence, and the law as given you by the court, he is liable as garnishee? (2) What do you find the value of such property to be under the testimony, and the law as given you by the court?" *Bethel v. Linn*, 63 Mich. 464, 472, 30 N. W. 84; *Perea v. Colorado Nat. Bank of Texas* (N. M.) 27 Pac. 322.

For other special questions see *Black v. Dawson*, 82 Mich. 485, 46 N. W. 793; *Dieter v. Smith*, 70 Ill. 168.

Special questions are submitted after the argument to the jury is closed. *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373.

But a general verdict may be demanded also in this as in other cases. *Shadbolt & Boyd Iron Co. v. Camp*, 80 Iowa, 539, 45 N. W. 1062; *Shahan v. Tallman*, 39 Kan. 185, 17 Pac. 823. Compare *De-laney v. Hartwig* (Wis.) 64 N. W. 1035.

When the garnishee is charged for specific property belonging to the defendant, it is not sufficient to show its value. The jury must find the specific goods. *Crawford v. Barry*, 1 Bin. (Pa.) 481.

²³ *Strong v. Hollon*, 39 Mich. 411; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 563.

Plaintiff need not prove return of execution in main action. *Good-ell v. Williams*, 21 Conn. 419.

²⁴ *Farrington v. Sexton*, 43 Mich. 454, 5 N. W. 654; *Henny Buggy Co. v. Patt*, 73 Iowa, 485, 35 N. W. 587; *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 563; *Farrar v. Bates*, 55 Tex. 193; *Merchants' & Manufacturers' Nat. Bank v. Haiman*, 80 Ga. 624, 5 S. E. 795.

CONTRA: When a garnishee appealed to the circuit court from a

tional document is missing from the records, a judgment rendered without proof that such papers ever existed, or any explanation of their absence, cannot be sustained.²⁵ The judgment against the principal defendant is important only as fixing the limit of the recovery against the garnishee, and for this purpose it may be proved by the judgment entry merely without producing the files;²⁶ and the objection that no such proof is made comes too late unless made at the trial, where it can be supplied, and the objection obviated.²⁷ But when the plaintiff, in taking issue on the answer, alleged the proceedings in detail, it was held that he must prove them.²⁸

judgment rendered against him by a justice of the peace upon a garnishment on execution, held that a judgment against the garnishee in the circuit court, without proof of an unsatisfied judgment against the defendant, and valid execution on which to found the garnishment, was void for want of jurisdiction. *Miller v. Wilson*, 86 Tenn. 495, 7 S. W. 638.

²⁵ *Blankenship & Blake Co. v. Moore* (Tex. App.) 16 S. W. 780.

The papers are not admissible unless coming from the proper custody. Papers coming from the possession of the plaintiff's attorney, and not marked "Filed" are inadmissible. *Bryant v. Bank of California* (Cal.) 7 Pac. 128.

²⁶ *Strong v. Hollon*, 39 Mich. 411.

The plaintiff's recovery against the garnishee may be for the amount of the judgment in the principal suit with interest. *Empire Car Roofing Co. v. Macey*, 115 Ill. 390, 3 N. E. 417.

If the judgment against the defendant, though rendered, is not docketed, and the garnishee objects to the proceedings against him on that ground, the court will proceed with the trial against the garnishee, and order the judgment in the principal case entered *nunc pro tunc*, and the garnishee cannot require proof of it. *Capital City Bank v. Wakefield*, 83 Iowa, 46, 48 N. W. 1059.

²⁷ *Sanger v. Guenther*, 73 Wis. 354, 41 N. W. 436.

²⁸ *McDonald v. Moore*, 65 Iowa, 171, 21 N. W. 504.

Competency of Evidence and Witnesses.

Evidence Confined to Issue.

§ 371. The same rules of evidence apply in this as in ordinary trials.²⁹ The testimony must be confined to the issue.³⁰ The plaintiff cannot prove a liability not within his pleadings,³¹ and the garnishee cannot show any defense not set up in his answer or plea,³² unless the court, upon proper terms, allow an amend-

²⁹ Kelley v. Weymouth, 68 Me. 197; McDonald v. Moore, 65 Iowa, 171, 21 N. W. 504.

When not rendered competent by statute, interested persons are as incompetent as witnesses in this as in any other trial. Beach v. Swift, 2 Conn. 269; Enos v. Tuttle, 3 Conn. 247.

³⁰ Freese v. Co-operative Coal Co., 67 Iowa, 42, 24 N. W. 583.

The fact of the indebtedness of the defendant to the plaintiff is not involved in this issue. Capital City Bank v. Wakefield, 83 Iowa, 46, 48 N. W. 1059; Jones v. Pope, 6 Ala. 154.

When the statute gives the garnishee no opportunity to set up any defense he may have to the plaintiff's reply, he may prove it without pleading. Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

³¹ See ante, § 358.

The plaintiff cannot controvert the statements of an answer upon which he has not taken issue. Batchellor v. Richardson, 17 Or. 334, 21 Pac. 392.

³² First Baptist Church of Chicago v. Hyde, 40 Ill. 150; Whetcroft v. Burford, 2 Cranch, C. C. 96, Fed. Cas. No. 17,505; Weil v. Posten, 77 Mo. 284. Compare Baker's Appeal (Pa. St.) 3 Atl. 766.

PLEADING SPECIAL DEFENSES: Former garnishment pending as a defense must be pleaded specially. See ante, § 191.

Set-off cannot be shown by the garnishee without notice. Fox v. Reed, 3 Grant, Cas. (Pa.) 81; Reed v. Penrose, 2 Grant, Cas. (Pa.) 472, 36 Pa. St. 214. Contra, Howe v. Hyer (Fla.) 17 South. 925.

A TRANSFER by the defendant of the debt or property garnished, made before the garnishment, and of which the garnishee had notice in time to state it in his answer, or by amended answer before the trial, cannot be given in evidence by him at the trial unless so spe-

ment of the pleadings.³³ And ordinarily the garnishee will not be permitted to give evidence contradicting the statements of his answer.³⁴

Evidence for Plaintiff.

§ 372. The liability of the garnishee may be shown by the disclosure made in the cause,³⁵ by his admissions against interest made out of court,³⁶ by his tes-

cially set up. *Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 84 Wis. 1, 54 N. W. 108; *Baker v. Mix*, 3 Cranch, C. C. 1, Fed. Cas. No. 775; *Fowler v. Williamson*, 52 Ala. 16.

Garnishee may give special matter of defense under statutory plea of general issue with notice of special matter. *Smyth v. Ripley*, 33 Conn. 306.

³³ Id.

³⁴ *Wingate v. Nutter*, 17 N. H. 256; *Woodbridge v. Winthrop*, 1 Root (Conn.) 557; *Weil v. Posten*, 77 Mo. 284. See ante, § 309.

It is in the discretion of the court to allow the garnishee to show error in his answer. *How. Ann. St. Mich.* § 8071; *Allen v. Hazen*, 26 Mich. 142; *Klauber v. Wright*, 52 Wis. 303, 8 N. W. 893.

The garnishee is not estopped by his answer. *Linder v. Murdy*, 37 Kan. 152, 14 Pac. 447.

³⁵ As to the disclosure in evidence, see ante, §§ 287-289.

The disclosure in the case made in justice court may be given in evidence against the garnishee in the circuit court on appeal. *Newell v. Blair*, 7 Mich. 103, 107. *Contra, Cairo & St. L. Ry. Co. v. Killenberg*, 92 Ill. 142.

But the entry upon the docket made by the justice, and not signed by the garnishee, cannot be put in evidence where it is not shown to be the whole of the examination as taken down at the time, and that no other minutes of the examination were taken or filed. *Watson v. Kane*, 31 Mich. 61.

Nor can the justice testify from memory in the circuit court as to what the garnishee disclosed before him. *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613.

And even the minutes taken by the justice are not such public records as import absolute verity. *Sutherland v. Burrill*, 82 Mich. 13, 43 N. W. 1122; *Taylor v. Kain*, 8 Baxt. (Tenn.) 35.

³⁶ *Ellis v. Goodnow*, 40 Vt. 237; *Stevens v. Guathmey*, 9 Mo. 636;

timony upon the stand,³⁷ by the principal defendant examined as a witness in the case,³⁸ or by any other

Schwab v. Gingerick, 13 Ill. 697; Des Moines Sav. Bank v. Colfax Hotel Co., 88 Iowa, 4, 55 N. W. 67; Watson v. Montgomery (Tex. App.) 16 S. W. 546.

REPRESENTATIONS ESTOPPING GARNISHEE: Probably the garnishee may estop himself from denying liability. Keppel v. Moore, 66 Mich. 292, 33 N. W. 499; Starry v. Korab, 65 Iowa, 267, 21 N. W. 600; Speed v. Holmes (Ky.) 32 S. W. 404.

But it has been held that the garnishee is not estopped by reason of declarations of liability made to the plaintiff, and in reliance upon which the plaintiff commenced the proceedings. Worder v. Baker, 54 Wis. 49, 11 N. W. 342; Phillipsburgh Bank v. Fulmer, 31 N. J. Law, 52; Lewis v. Prenatt, 24 Ind. 98. Compare Blake Crusher Co. v. Town of New Haven, 46 Conn. 473, 476; Excelsior Steam Power Co. v. Cosmopolitan Pub. Co., 80 Hun, 592, 30 N. Y. Supp. 537.

Held, that letters written by the garnishee, and tending to show his liability, are admissible against him. Thompson v. Stewart, 3 Conn. 171.

Held, that statements made by the garnishee to the officer serving the summons upon him that he was indebted to the defendant are inadmissible against him. Maynards v. Cornwell, 3 Mich. 309.

Held, that an admission of liability by the garnishee, made to the person who served the notice of trial of the garnishment issue at the time the notice was served, and in response to a direct question, is no admission, for the reason that the garnishee might properly treat the question as an impertinence. Quinn v. Blanck, 55 Mich. 269, 21 N. W. 307.

ADMITTING DEBT BY PAYING IT: It has been held that the payment by the garnishee to the defendant of a sum of money under bond of indemnity against the garnishment is an admission on indebtedness sufficient to support a judgment. Humphrey v. O'Donnell, 165 Pa. St. 411, 30 Atl. 992.

³⁷ The cashier and clerk who disclosed for the garnishee bank may be examined on the trial by the plaintiff. Young v. First Nat. Bank of Cairo, 51 Ill. 73.

IMPEACHMENT: The court may, in its discretion, permit the

³⁸ See following page.

competent witness or evidence;³⁹ and the plaintiff may testify in his own favor.⁴⁰

plaintiff to question the garnishee as to whether he has not made statements different from those just made when the plaintiff has made him his witness. *Trunkey v. Crosby*, 33 Minn. 464, 23 N. W. 846.

As to taking garnishee's deposition, see *Jones v. Roberts*, 60 N. H. 216.

³⁸ *Barnes v. Circuit Judge of Wayne Co.*, 81 Mich. 374, 45 N. W. 1016.

The plaintiff may have the testimony of the defendant taken under deposition and given in evidence at the trial. *Mygatt v. Burton*, 74 Wis. 352, 43 N. W. 100.

The defendant is not a party to the garnishment suit so as to disqualify him at common law as a witness for the plaintiff. *Wallace v. Blanchard*, 3 N. H. 395.

A writing found among the papers of the defendant after his decease, tending to prove his ownership of the money garnished, held admissible for that purpose. *Beach v. Swift*, 2 Conn. 269.

The defendant may be examined as to conversations between him and the garnishee, tending to show that the transfer to the latter was for the purpose of defrauding creditors of the former. *Risser v. Rathburn*, 71 Iowa, 113, 32 N. W. 198; *Ruby v. Schee*, 51 Iowa, 422, 1 N. W. 741.

But declarations of the defendant, made out of court, are not admissible against the garnishee when it is not shown that they are admissions against the interest of the principal defendant. *Enos v. Tuttle*, 3 Conn. 247.

Upon an issue seeking to establish fraud and collusion between the defendant and garnishee the declarations of either are evidence for the plaintiff. *Palmer v. Gilmore*, 148 Pa. St. 48, 23 Atl. 1041; *Sommer v. Gilmore*, 160 Pa. St. 129, 28 Atl. 654.

³⁹ *Thompson v. Stewart*, 3 Conn. 171; *Barnes v. Circuit Judge of Wayne Co.*, 81 Mich. 374, 45 N. W. 1016; *Meigs v. Weller*, 90 Mich. 629, 51 N. W. 681; *Arenz v. Reihle*, 1 Scam. (Ill.) 342.

Declarations not against interest by strangers to the suit are inadmissible. *Baltimore & O. Ry. Co. v. Gallahue*, 12 Grat. (Va.) 655, 65 Am. Dec. 254.

⁴⁰ *Zimmer v. Davis*, 35 Mich. 39.

Evidence for Garnishee.

§ 373. In the same manner the garnishee may disprove his liability. He may testify in his own behalf,⁴¹ introduce his formal answer in evidence,⁴² or show by the testimony of the principal defendant,⁴³ or any other competent evidence, that he is not chargeable.

The Defense.*Defendant and Claimants cannot Take Part in.*

§ 374. Neither the principal defendant nor any claimant of the property is a party to this issue, and

⁴¹ Vaughn v. Sherwood, 1 Root (Conn.) 507; Thompson v. Stewart, 3 Conn. 171, 182.

The garnishee may testify as to the amount of property belonging to the defendant which he has received. Spencer v. Moran, 80 Iowa, 374, 45 N. W. 902.

The garnishee's testimony is entitled to full credit as evidence. Henry v. Bew, 43 La. Ann. 476, 9 South. 101.

⁴² See ante, §§ 287, 289.

When the proceedings against several garnishees are conducted jointly, they will be regarded as joint defendants; and the answer of one is evidence for the other. Pollock v. Jones, 96 Ala. 492, 11 South. 529.

⁴³ Tyler v. Coolbaugh, 7 Iowa, 474; Enos v. Tuttle, 3 Conn. 247.

Admissions against interest made by the defendant are admissible in favor of the garnishee. Dewit v. Baldwin, 1 Root (Conn.) 138. Contra, Thomas v. Price, 30 Md. 483.

When the defendant is interested in having the garnishee discharged, his statements are not evidence as admissions against interest. Beach v. Swift, 2 Conn. 269; Enos v. Tuttle, 3 Conn. 247; Bostwick v. Beach, 18 Ala. 80.

Statements made by the defendant after the garnishee was served are not competent evidence against the plaintiff and in favor of the garnishee as declarations against interest. Willis v. Holmes (Or.) 42 Pac. 989; Warren v. Moore, 52 Ga. 562.

neither has any right to take part in the defense upon it; and to permit either to do so is error.⁴⁴ Neither the defendant nor other several garnishees are entitled to notice of the proceedings had.⁴⁵ So far as the conduct of the case is concerned, it is entirely independent of the main action, and substantially another suit; and therefore a motion made in the garnishment suit to make one of the garnishees a defendant in the main action should be denied.⁴⁶ The principal defendant is entitled to appear in the garnishment suit, and contest the plaintiff's right to recovery against the garnishee on the ground that the garnished property is exempt,⁴⁷ or to show that the judgment in the main action has been satisfied;⁴⁸ and by statute in some states he may defend generally.⁴⁹

⁴⁴ *Keppel v. Moore*, 66 Mich. 292, 33 N. W. 499; *Wales v. City of Muscatine*, 4 Iowa, 302; *Thompson v. Silvers*, 59 Iowa, 670, 13 N. W. 854; *Greene v. Tripp*, 11 R. I. 424; *Jarvis v. Mitchell*, 99 Mass. 530; *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. 639; *Foster v. Haynes*, 88 Ga. 240, 14 S. E. 570; *Cross v. Spillman*, 93 Ala. 170, 9 South. 362; *Woodward v. Woodward*, 9 N. J. Law, 115, 17 Am. Dec. 462. *Contra*, *P. Cox Manuf'g Co. v. August*, 51 Kan. 59, 32 Pac. 636.

If the plaintiff does not object at the time, the irregularity is waived, and cannot be urged afterwards. *Murphree v. City of Mobile* (Ala.) 18 South. 740.

⁴⁵ *Dittenhoefer v. Cœur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660.

⁴⁶ *Reeves v. Harrington*, 85 Iowa, 741, 52 N. W. 517.

⁴⁷ See ante, § 85.

⁴⁸ *Wales v. City of Muscatine*, 4 Iowa, 302; Compare *Everdell v. Sheboygan & Fond du Lac Ry. Co.*, 41 Wis. 395.

⁴⁹ *German American Bank v. Butler-Mueller Co.*, 87 Wis. 467, 58 N. W. 746.

Garnishee may Question Proceedings in Main Action and Protect Claimant.

§ 375. On the other hand, the garnishee must insist upon not being charged, unless the claims of all persons to the property would be thereby foreclosed, so that the judgment against him will discharge his obligation, and protect him from future liability.⁵⁰ He must see that he is not charged under void proceedings.⁵¹ If a fact, he may and should show that the judgment against the defendant has been paid in whole or in part, or otherwise discharged,⁵² or has become dormant or otherwise unenforceable, either of which would be a good defense.⁵³ If the judgment against the defendant is binding upon him, it will support the garnishment and protect the garnishee.⁵⁴ That is the extent of the garnishee's interest, and he cannot question the correctness of the judgment, or inquire as to mere errors and irregularities in such proceedings for which the defendant might have them set aside on appeal or otherwise.⁵⁵ But if the pro-

⁵⁰ Such defenses cannot be proved at the trial unless made by the pleadings. See ante, § 371.

⁵¹ See ante, § 213.

⁵² *Chanute v. Martin*, 25 Ill. 49.

⁵³ *Weaver v. Pickard*, 7 Utah, 296, 26 Pac. 581.

⁵⁴ *Id.* See ante, § 226.

⁵⁵ See ante, § 226; *Summers v. Oberndorf*, 73 Md. 312, 20 Atl. 1068; *Bartlett v. Wilbur*, 53 Md. 485; *Cummings v. Fearey*, 44 Mich. 39, 6 N. W. 98.

If the court has jurisdiction, the proceedings in the main action, until set aside, are, in the garnishment suit, conclusive against all parties,—defendant, claimant, and garnishee. *Iselin v. Simon* (Minn.) 64 N. W. 143; *Chaffee v. Rutland Ry. Co.*, 55 Vt. 110, 141.

If the garnishee can ever take advantage of fraud and collusion between the plaintiff and defendant in procuring the judgment in

ceedings against the principal defendant are absolutely void, the garnishee may at any stage of the action insist on being discharged on that ground.⁵⁶

Irregularities—Statute of Limitations—Failure of Consideration—Equitable Defenses.

§ 376. The garnishee may take advantage of any irregularity in the proceedings against himself unless previously waived,⁵⁷ and he must, for his own protection, take advantage of jurisdictional defects.⁵⁸ In his defense on the merits he stands in exactly the same position as if the suit were being prosecuted against him by the principal defendant himself.⁵⁹ If he fails to interpose a defense in the proper time and manner, and seeks to avail himself of it afterwards,

the main action, he can do so only by bill in equity. *Coalfields Co. v. Peck*, 98 Ill. 139, 145.

What is *res judicata* by the judgment in the main action the garnishee cannot question. *Rumery v. McCulloch*, 54 Wis. 565, 12 N. W. 65.

⁵⁶ See ante, § 225; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121.

DUTY TO EXAMINE PRINCIPAL CASE: The garnishee is under no obligation to examine the proceedings in the principal suit before pleading. He has a right to presume that they were regular, and is entitled to make the objection as to irregularity when the proof is offered. That the proceedings were void is wholly the fault of the plaintiff. It is his duty to see that he has a valid judgment against the defendant, which would protect the garnishee in any suit afterwards brought by the defendant against him for the same money. *Segar v. Muskegon Shingle & Lumber Co.*, 81 Mich. 344, 45 N. W. 982.

⁵⁷ See ante, § 286.

⁵⁸ Ante, §§ 213, 238, 271.

⁵⁹ See Ante, §§ 44-48.

He cannot set up his own fraud as a defense. See ante, § 76.

he appeals to the discretion of the court.⁶⁰ He may set up the statute of limitations as a defense to liability,⁶¹ or show that the consideration for his obligation had failed,⁶² or he may set up any equitable defense he may have,⁶³ or show that the property for which the plaintiff seeks to charge him was taken from his hands under an execution or attachment in favor of the plaintiff.⁶⁴

Agreements within Statute of Frauds.

§ 377. When the garnishee, before the service of the garnishment summons upon him, has, by promise within the statute of frauds, obligated himself to pay to a third person what was due the defendant, he may set up such obligation to defeat the plaintiff's recovery, if the statute merely makes contracts within it

⁶⁰ Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139.

⁶¹ Benton v. Lindell, 10 Mo. 557; Hinkle v. Currin, 2 Humph. (Tenn.) 137; Gee v. Cumming, 2 Hayw. (N. C.) 398; Gee v. Warwick, Id. 354; Hazen v. Emerson, 9 Pick. (Mass.) 144; Crossman v. Crossman, 21 Pick. (Mass.) 21, 24; James v. Fellowes, 20 La. Ann. 116; Chapman v. Gale, 32 N. H. 141; Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

Action upon the garnishee's answer is barred in Kansas in three years. Becker v. Hulme, 53 Kan. 574, 36 Pac. 986.

⁶² Ball v. Citizens' Nat. Bank, 39 Ind. 364; Moser v. Maberry, 7 Watts (Pa.) 12; Mowry v. Davenport, 6 Lea (Tenn.) 80; Russell v. Hinton, 1 Murph. (N. C.) 468; Sheldon v. Simonds, Wright (Ohio) 724; Mathis v. Clark, 2 Mill, Const. (S. C.) 456; 12 Am. Dec. 688.

⁶³ Hitchcock v. Galveston Wharf Co., 50 Fed. 263.

⁶⁴ Bradford v. Beyer, 17 Ohio St. 389; Toledo Sav. Bank v. Johnston (Iowa) 62 N. W. 748.

The garnishee cannot be charged for property taken from him under an execution against the principal defendant in favor of the garnishment plaintiff, issued in the same action in which the garnishee is summoned, though the execution turn out to be premature and void. Goddard v. Bridgman, 25 Vt. 351.

unenforceable, for in that case the contract is not void, and the statute is a privilege which the obligator may interpose or not, at his option;⁶⁵ but, if the statute makes contracts within it absolutely void, the garnishee cannot have recourse to any such promise to prevent being charged.⁶⁶

May Prove Set-Off or Recoupment as if Sued by Defendant.

§ 378. What counterclaims can be maintained by way of set-off or recoupment in an ordinary action of course depends entirely upon the provisions of the statute in each state, allowing defenses of that nature, and these differ widely. Any set-off which the garnishee could claim under the statute in an ordinary action against him by the principal defendant he may interpose with equal success to prevent being charged as garnishee.⁶⁷ The same is true of claims by

⁶⁵ Cahill v. Bigelow, 18 Pick. (Mass.) 369; Swett v. Ordway, 23 Pick. (Mass.) 266; McCoy v. Williams, 6 Ill. 584; Compare Bailey v. Union Pac. Ry. Co., 62 Iowa, 354, 17 N. W. 567.

⁶⁶ Hazeltine v. Page, 4 Vt. 49; Strong v. Mitchell, 19 Vt. 644; Baer v. English, 84 Ga. 403, 11 S. E. 453.

⁶⁷ Parsons v. Root, 41 Conn. 161, 166; Farmers' & Merchants' Bank v. Franklin Bank, 31 Md. 404; Gage v. Chesebro, 49 Wis. 486, 492, 5 N. W. 881; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Cox v. Russell, 44 Iowa, 556, 562; Dyer v. McHenry, 13 Iowa, 527; Boston Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. (Mass.) 166; Keyes v. Milwaukee & St. P. Ry. Co., 25 Wis. 691, 695; Strong v. Bass, 35 Pa. St. 333; Ashby v. Watson, 9 Mo. 236; Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11,133; Rosenberg v. First Nat. Bank of Texarkana (Tex. Civ. App.) 27 S. W. 897; Nesbitt v. Campbell, 5 Neb. 429; Howe v. Hyer (Fla.) 17 South. 925; Sampson v. Hyde, 16 N. H. 492; Brown v. Warren, 43 N. H. 430; How. Ann. St. Mich. § 8097.

An executor summoned as garnishee of a legatee may set off an

way of recoupment.⁶⁸ On the other hand, the garnishee cannot maintain any counterclaim which would not be available to him if the action were being prosecuted by the principal defendant.⁶⁹

Various Rules as to What Demands may be Set Off.

§ 379. In some states a very liberal rule obtains in favor of the garnishee in adjusting mutual claims be-

indebtedness of the legatee to his testator's estate. *Nickerson v. Chase*, 122 Mass. 296; *Strong v. Bass*, 35 Pa. St. 333.

CLAIMS OF TRUSTEES UNDER GENERAL ASSIGNMENT: When a trustee for certain creditors under a deed of assignment for their benefit is summoned as garnishee of the assignor, and the assignment is held to be void, the trustee may nevertheless retain of the property received thereunder a sufficient amount to balance his own claims against the assignor. *Beach v. Viles*, 2 Pet. 675; *Andrews v. Ludlow*, 5 Pick. (Mass.) 28; *Ripley v. Severance*, 6 Pick. (Mass.) 474; *Firebaugh v. Stone*, 36 Mo. 111, 114; *Stedman v. Vickery*, 42 Me. 132; *Bishop v. Catlin*, 28 Vt. 71.

PARTY TO FRAUD: But a party to a conveyance, entered into by him with the intention of defrauding the defendant's creditors, has no such right. *Cummings v. Fearey*, 44 Mich. 39, 6 N. W. 98; *Hawes v. Mooney*, 39 Conn. 37.

⁶⁸ *Powell v. Sammons*, 31 Ala. 552; *Rankin v. Simonds*, 27 Ill. 352; *Healey v. Butler*, 66 Wis. 9, 16, 27 N. W. 822; *Doyle v. Gray*, 110 Mass. 206; *Hitchcock v. Lancto*, 127 Mass. 514; *Thompson v. Allison*, 28 La. Ann. 733; *Brown v. Brown*, 55 N. H. 74; *Cota v. Mishow*, 62 Me. 124; *Johnson v. Geneva Pub. Co.*, 122 Mo. 102, 26 S. W. 676.

⁶⁹ *Soule v. Kennebec Maine Ice Co.*, 85 Me. 166, 27 Atl. 92; *Smith v. Boston, C. & M. Ry. Co.*, 33 N. H. 337; *Archer v. People's Sav. Bank*, 88 Ala. 249, 7 South. 53; *Milliken v. Mannheimer*, 49 Minn. 521, 52 N. W. 139.

SET-OFF AGAINST PLAINTIFF: He cannot set off claims he may have against the plaintiff in garnishment. *Steen v. Norton*, 45 Wis. 413.

AN UNAUTHORIZED PAYMENT to a third person by the garnishee is not binding on the defendant, and therefore no defense to the plaintiff's action, and the fact that after the garnishment the

tween him and the defendant, and he is allowed to set off any demand contracted before the service of the garnishment summons, and becoming due before his final answer,⁷⁰ although only part of the debtors

defendant ratified the payment is immaterial, as the *jus disponendi* was taken away from him by the garnishment. *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175.

A garnishee claimed that his debt to the defendant had been paid by applying it on a debt from the defendant to the garnishee. The application, being unauthorized, was of no effect, and, a set-off not being claimed, held, that the garnishee was properly charged. *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520.

LIENS ON PROPERTY: A garnishee sought to be charged on account of property in his possession belonging to the defendant has no greater right against the plaintiff to charge it with a lien for his claim against the defendant than he would have if the defendant were prosecuting the suit. *Allen v. Hall*, 5 Metc. (Mass.) 263; *Brewer v. Pitkin*, 11 Pick. (Mass.) 298; *Allen v. Megguire*, 15 Mass. 490; *Bailey v. Ross*, 20 N. H. 302.

A garnishee with whom the defendant left a horse to board, being entitled to a lien on the animal for its keep, is entitled to have his claim first satisfied out of the property. *Williamson v. Gayle*, 7 Grat. (Va.) 152. Compare *Bough v. Kirkpatrick*, 54 Pa. St. 84; *Ronan v. Dawes*, 17 Mo. App. 306.

⁷⁰ *Lennan v. Walter*, 149 Mass. 14, 20 N. E. 196; *Boston Type & Stereotype Foundry Co. v. Mortimer*, 7 Pick. (Mass.) 166; *Eddy v. O'Hara*, 132 Mass. 56, 61; *Lynde v. Watson*, 52 Vt. 648; *Strong v. Mitchell*, 19 Vt. 644; *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648; *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710; *Broadman v. Cushing*, 12 N. H. 105; *Boston & M. Ry. Co. v. Oliver*, 32 N. H. 172; *Farmers' & Merchants' Bank v. Franklin Bank*, 31 Md. 404.

The set-off may include costs incurred after service of the garnishment summons in procuring the judgment set off. *Smith v. Stearns*, 19 Pick. 20.

EQUITABLE SET-OFFS: Only the balance after deducting all just and equitable allowances is the amount for which the garnishee should be charged. *Allen v. Hall*, 5 Metc. (Mass.) 263, 266; *Green v. Nelson*, 12 Metc. (Mass.) 567; *Nutter v. Framingham & L. Ry. Co.*,

on one side are creditors on the other.⁷¹ But the more prevalent rule is that no demand can be set off

132 Mass. 427; *Wheeler v. Emerson*, 45 N. H. 526; *Farmers' & Merchants' Bank v. Franklin Bank*, 31 Md. 404.

"He is to be allowed all his demands against the principal, of which he could avail in any form of action, or any mode of proceedings between himself and his principal; whether by way of set-off on the trial, as provided by the statutes, or by setting off the judgments under an order of court, or by setting off the executions in the hands of the sheriff, as is also provided by statute. If this were not so, the trustee would be injured by having his claim thus drawn in, to be settled incidentally in a suit between strangers. In this adjustment of their mutual claims we, of course, except on both sides all claims for unliquidated damages for mere torts." *Hathaway v. Russell*, 16 Mass. 473, 476; approved in *Smith v. Stearns*, 19 Pick. 20, 22; *Eddy v. O'Hara*, 132 Mass. 56, 61.

The supreme court of the United States in a recent decision held that a garnishee, who at the time he was summoned as garnishee had a claim against the defendant for breach of contract (and who upon the trial of garnishment issue offered to prove the damages suffered by reason of such breach of contract, which evidence the court rejected), might maintain a bill in equity to restrain collection of the judgment rendered against him, and to assess the amount of his claim against the defendant, and have the same set off against the judgment rendered in favor of the plaintiff in garnishment, it appearing that the defendant was insolvent, and a nonresident of the state. In delivering the opinion of the court, Jackson, J., uses the following language: "Cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced, by way of set-off, whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice. * * * The adjustment of demands by counterclaim or set-off, rather than by inde-

⁷¹ *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648; *Hathaway v. Russell*, 16 Mass. 473; *Brown v. Warren*, 43 N. H. 430.

Held, that a garnishee may set off against his liability at all events his share of a demand against the defendants owned by such garnishee and another, and with the consent of the other may set off the whole amount. *Nutter v. Framingham & L. Ry. Co.*, 132 Mass. 427; *Manufacturers' Bank v. Osgood*, 12 Me. 117.

unless arising on contract, express or implied,⁷² held by the garnishee in the same right in which he is sought to be charged,⁷³ due at the time the garnish-

pendent suit, is favored and encouraged by the law, to avoid circuity of action and injustice. * * * The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor, is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor, and can assert only the right of the latter." *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 715, 716.

⁷² *Johnston v. Howard*, 41 Vt. 122; *Thayer v. Partridge*, 47 Vt. 423; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *Keyes v. Milwaukee & St. P. Ry. Co.*, 25 Wis. 691. Compare *City of Camden v. Allen*, 26 N. J. Law, 398; *Peirce v. City of Boston*, 3 Metc. (Mass.) 520.

UNLIQUIDATED DAMAGES for the breach of another contract cannot be set off. *Gomila v. Milliken*, 41 La. Ann. 116, 5 South. 548; *Irwin v. Dean*, 93 Tenn. 346, 27 S. W. 666.

⁷³ DEBT AND COUNTERCLAIMS IN DIFFERENT RIGHTS: A garnishee summoned as executor cannot set off a claim which he, as an individual, has against the defendant. *Lorenz v. King*, 38 Pa. St. 93.

A garnishee summoned on his own debt cannot set off a claim against the defendant which he has as administrator of another person. *Thomas v. Hopper*, 5 Ala. 442; *Woodward v. Tupper*, 58 N. H. 577.

A garnishee indebted to the defendant individually cannot set off a debt due from the defendant to him and another jointly. *Gray v. Badgett*, 5 Ark. 16; *Phelps v. Reeder*, 39 Ill. 172.

Joint garnishees cannot set off their individual claims against their joint liability to defendant. *Wells v. Mace*, 17 Vt. 503; *Blanchard v. Cole*, 8 La. 160.

A garnishee indebted to the defendants jointly cannot set off his claim against one of them. *Norcross v. Benton*, 38 Pa. St. 217.

Claims against the defendants and others jointly cannot be set off. *National Bank of Commerce of Chicago v. Titsworth*, 73 Ill. 591.

ment summons was served,⁷⁴ and a legal, as distinguished from an equitable, claim.⁷⁵

After-Acquired Claims—Burden of Proof—Intention to Claim against Defendant.

§ 380. Claims acquired after the garnishment summons was served of course cannot be set off;⁷⁶ and

⁷⁴ *Edwards v. Delaplaine*, 2 Har. (Del.) 322; *Parsons v. Root*, 41 Conn. 161; *Ingalls v. Dennett*, 6 Me. 79; *Self v. Kirkland*, 24 Ala. 275; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Pennell v. Grubb*, 13 Pa. St. 552; *Tradesmen's Bank v. Cresson*, 10 Pa. Co. Ct. R. 57.

GARNISHEE LIABLE AS SURETY: The garnishee, having become surety for the defendant, cannot interpose a set-off on account of such suretyship when his liability thereon had not become absolute at the time the garnishment was served, although it becomes so and is paid by the garnishee before he answers to the garnishment. *Yongue v. Linton*, 6 Rich. Law (S. C.) 275; *Martin v. Solomons*, 10 Rich. Law (S. C.) 533; *Roig v. Tim*, 103 Pa. St. 115; *Taylor v. Gardner*, 2 Wash. C. C. 488, Fed. Cas. No. 13,791. Contra, *Rowell v. Felker*, 54 Vt. 526, 531; *Boston Type & Stereotype Foundry Co. v. Mortimer*, 7 Pick. 166. A garnishee cannot set off demands which he has become responsible for as surety, when he has not absolutely assumed the payment of the debt. *Noyes v. Hickok*, 27 Vt. 36. Held, that judgment against the garnishee on account of his suretyship, rendered before the service of the garnishment summons, could not be set off, although paid by him afterwards. *Field v. Watkins*, 5 Ark. 672; *Watkins v. Field*, 6 Ark. 391. But a surety cannot be deprived of his indemnity by garnishment, although his principal has as yet made no default. *Ripley v. Severance*, 6 Pick. (Mass.) 474; *St. Louis v. Regenfuss*, 28 Wis. 144; *Cox v. Russell*, 44 Iowa, 556; *Dryden v. Adams*, 29 Iowa, 195.

⁷⁵ *Weller v. Weller*, 18 Vt. 55; *Loftin v. Shakelford*, 17 Ala. 455; *Self v. Kirkland*, 24 Ala. 275. But see *Dyer v. McHenry*, 13 Iowa, 527.

⁷⁶ *Farmers' Bank v. Gettinger*, 4 W. Va. 305; *Seaman v. Bank*, Id. 339; *Dyer v. McHenry*, 13 Iowa, 527; *Crain v. Gould*, 46 Ill. 293; *Wheeler v. Emerson*, 45 N. H. 526; *Farmers' & Merchants' Bank v. Franklin Bank*, 31 Md. 404.

when it becomes a question whether the set-off was acquired before or after that time, the garnishee must show that it was acquired before, or it will not avail him.⁷⁷ Proof that the garnishee did not intend to enforce the set-off against the defendant is immaterial unless it shows a waiver of the right.⁷⁸

Matters in Abatement of Action.

§ 381. Innumerable causes may of their own force or by statute entitle the garnishee to be discharged, among which may be mentioned payment of the plaintiff's claim by the garnishee under stipulation of all parties;⁷⁹ payment by the defendant;⁸⁰ giving bail to the plaintiff, pursuant to statute, to satisfy the judgment he may recover;⁸¹ the death of the principal defendant before judgment against him,⁸² but not afterwards;⁸³ the death of the garnishee before answering the garnishment summons,⁸⁴ but not afterwards;⁸⁵ the dissolution of the corporation gar-

⁷⁷ Pennell v. Grubb, 13 Pa. St. 552.

⁷⁸ Howe v. Hyer (Fla.) 17 South. 925.

⁷⁹ Platen v. Byck, 50 Ga. 245; Borden v. Noble, 26 Kan. 599; Daniel v. Daniels, 62 Miss. 352.

⁸⁰ McFadden v. O'Donnell, 18 Cal. 160.

⁸¹ See ante, §§ 318-324.

⁸² Martin v. Abbot, 1 Me. 333; Farnsworth v. Page, 17 N. H. 334; Seals v. Halloway, 77 Ala. 344; Wilmarth v. Richmond, 11 Cush. (Mass.) 463; Farmers' & Mechanics' Bank v. Little, 8 Watts & S. (Pa.) 207. Contra, by statute, Davis v. Sharpleigh, 19 Ill. 386; Dow v. Blake, 148 Ill. 46, 35 N. E. 761.

⁸³ Miller v. Williams, 30 Vt. 386; Fitch v. Ross, 4 Serg. & R. (Pa.) 557; Patterson v. Buckminster, 14 Mass. 144; Reynolds v. Howell (Del. Err. & App.) 31 Atl. 875; Allard v. De Brot, 15 La. 253.

⁸⁴ Tate v. Morehead, 65 N. C. 681; White v. Ledyard, 48 Mich. 264, 12 N. W. 216; Guptill v. Ayer, 149 Mass. 49, 20 N. E. 449.

⁸⁵ Patterson v. Buckminster, 14 Mass. 144; Patterson v. Patten,

nishee;⁸⁶ delay of the plaintiff in prosecuting the suit;⁸⁷ his attaching the property in the garnishee's

15 Mass. 473; *Hall v. Harvey*, 3 N. H. 61; *Chapman v. Gale*, 32 N. H. 141; *Rollins v. Robinson*, 35 N. H. 381; *Parker v. Parker*, 2 Hill, Eq. (S. C.) 35; *Wooten v. Harris*, 5 Har. (Del.) 254; *Harris v. Hutcheson*, 65 Miss. 9, 3 South. 34.

But held, that judgment *de bonis testatoris* against an executor as garnishee binds neither the testator's estate nor the executor personally. *Bickle v. Chrisman*, 76 Va. 678.

When two persons are garnished as partners, and both answer, and thereafter one of them dies *pendente lite*, the proceedings may be prosecuted to judgment against the other, as surviving partner. *Gaines v. Beirne*, 3 Ala. 114.

⁸⁶ *Walters v. Western & A. R. Co.*, 69 Fed. 679.

In this case the garnishee answered, admitting liability for \$80, and the plaintiff took issue on the answer, and on the trial the verdict was in favor of the garnishee, and was set aside, and a new trial ordered. Before the new trial was had, the garnishee corporation was dissolved by expiration of its charter, and the plaintiff in garnishment intervened by petition in an equitable proceeding then instituted to wind up the affairs of the corporation, and sought to establish and have allowed him out of the assets of the company whatever liability in favor of the defendant in the original action he could prove to have existed. The court said the garnishment fell by the dissolution of the corporation garnishee, that whatever rights were acquired by the garnishment depended upon maintaining it and concluding it before the dissolution of the corporation, and before the assets went into a court of equity for distribution among shareholders and creditors; but the court nevertheless allowed and ordered to be paid to the petitioner the \$80 for which the garnishee had admitted liability in its answer.

⁸⁷ See *ante*, § 365, and *post*, § 382, note.

Plaintiff's failure to take garnishee's deposition at appointed time held to entitle the latter to be discharged. *Demeritt v. Estes*, 56 N. H. 313; *Ogden v. Mills*, 3 Cal. 253. Garnishee held entitled to presume from the plaintiff's conduct that he had abandoned the proceedings, thus excusing the garnishee's default. *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. 111; *Platen v. Byck*, 50 Ga. 245.

When the garnishee makes oath that he was released by the plain-

hands by actual seizure;⁸⁸ the dissolution of the attachment under which the garnishee was summoned;⁸⁹ the failure of the plaintiff to recover in the principal suit;⁹⁰ a general assignment by the defendant for the benefit of his creditors.⁹¹

Only the Judgment can Terminate the Action.

§ 382. These and a multitude of other matters have been held sufficient for discharging the garnishee, but none of them discharge him ipso facto, although such would seem to be the inference from some of the decisions cited in the last preceding section.⁹² Once properly instituted, the case remains open in court till the judgment is pronounced, regardless of all events affecting the rights of either party; and whoever presumes upon the effect of any act or

tiff, he should be discharged without delay, unless his statement is controverted. *Ogden v. Mills*, 3 Cal. 253.

⁸⁸ *Clapp v. Rogers*, 38 N. H. 435.

⁸⁹ *Mitchell v. Watson*, 9 Fla. 160.

⁹⁰ See ante, § 224; *Suydam v. Huggeford*, 23 Pick. (Mass.) 465; *Washburn v. New York & V. Min. Co.*, 41 Vt. 50; *Bethel v. Judge of Superior Court*, 57 Mich. 379, 24 N. W. 112.

"In all cases where judgment is rendered in favor of the plaintiff in the principal suit, a garnishee is not discharged or entitled to judgment of discontinuance by a change of parties to the record, where the claim was one that was garnishable at the time of service of process." *Bethel v. Judge of Superior Court*, 57 Mich. 379, 24 N. W. 112.

⁹¹ *Fairbanks v. Whitney*, 36 Minn. 305, 30 N. W. 812; *Thomas v. Brown*, 67 Md. 512, 10 Atl. 713.

An assignment does not have this effect except by force of statute. See ante, § 45.

Appointment of a receiver for defendant corporation held not to entitle the garnishee to be discharged. *Graham v. O'Neil*, 24 Wis. 31; *Graham v. Chappell*, 24 Wis. 38.

⁹² *Graves v. Cooper*, 8 Ala. 811; *Bostwick v. Beach*, 18 Ala. 80.

omission or what the judgment of the court will be does so at his peril.⁹³

⁹³ *Ashley v. Dunn*, 4 Ark. 516; *Chase v. Foster*, 9 Iowa, 429; *Bostwick v. Beach*, 18 Ala. 80; *Graves v. Cooper*, 8 Ala. 811.

ILLUSTRATIONS—MATTERS NOT CAUSING ABATEMENT: Failure to continue the cause held not to entitle the garnishee to be discharged, though he had paid the defendant in reliance upon it. *Hughes v. Monty*, 24 Iowa, 499; *Langford v. Ottumwa W. P. Co.*, 53 Iowa, 415, 5 N. W. 574. Failure of the plaintiff for six years to proceed upon the answer of the garnishee held not to discharge the garnishee, but to have great weight with the court in relieving him from hard proceeding. *Slatter v. Tiernan*, 6 La. Ann. 567. Failure to prosecute scire facias against a garnishee for fourteen years held not to entitle him to be discharged. *Weber v. Carter*, 1 Phila. (Pa.) 221; *Cookson v. Turner*, 2 Bin. (Pa.) 453; *Gibbons v. Cherry*, 53 Md. 144; *Noble v. Merrill*, 48 Me. 140.

Failure to file interrogatories within the time required by law held not to entitle the garnishee to be discharged. *Ashley v. Dunn*, 4 Ark. 516. Judgment for defendant in the main action from which the plaintiff appeals does not entitle the garnishee to be discharged. See post, § 407. If the garnishee pays to the plaintiff before judgment is recovered against the defendant he does so at his peril; he should not pay till the proceedings are complete. *Laidlaw v. Morrow*, 44 Mich. 547, 7 N. W. 191. See, also, ante, § 213. Waiting for two years after service before citing the garnishees to appear and answer held equivalent to an abandonment of the proceedings. *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223.

CHAPTER XVIII.

JUDGMENT.

- § 383. Time and Notice of Application for Judgment—Judgment may be Had at Any Time after Answer.
384. — Notice of Application for Judgment.
385. — Judgment cannot be Rendered before Judgment in Main Action.
386. Judgment by Default—Entering and Setting Aside.
387. — Nature and Effect of.
388. — Scire Facias and Proof of Regularity on.
389. Judgment on the Pleadings.
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391. Nature and Amount of Judgment—Some Statutes Allow no Final Judgment against Garnishee.
392. — Limited in Amount by Liability of Defendant and Garnishee.
393. — Judgment for Property in Garnishee's Possession and Debts not Payable in Money.
394. — For Unmatured Debts—Following Affidavit.
395. Judgment Record—Form and Substance—Entitling—Combining.
396. — Recitals and Averments—Time of Recording.

Time and Notice of Application for Judgment.

Judgment may be Had at Any Time after Answer.

§ 383. Probably the garnishee may, upon proper application, obtain a judgment discharging him at any time after he is summoned, if good cause for it is shown;¹ but he will not be discharged before making answer upon any ground not going to the validity of the proceedings against him, unless on the ground of

¹ See "Affidavit," "Summons," "Service," etc., ante; *Dunham v. Murphy* (Tex. Civ. App.) 28 S. W. 132. See ante, § 333.

personal privilege,² and, if discharged, the judgment will be set aside upon appeal.³ The garnishee, upon making answer, may move to be discharged, and thus obtain the determination of the court upon his liability;⁴ but he will not be discharged after making answer showing *prima facie* liability to the defendant, except upon a regular trial, unless his right thereto fully appears;⁵ nor in any case until the plaintiff has had opportunity to contest or take further proceed-

² See ante, § 14.

³ *Graham v. O'Neil*, 24 Wis. 34.

But, if all the facts which could be shown by answer are admitted, no reason appears why the motion may not be treated the same as if answer had been made showing them. *Lord v. Meachem*, 32 Minn. 66, 19 N. W. 346.

⁴ *Chase v. Foster*, 9 Iowa, 429; *Goulding v. Hair*, 133 Mass. 78.

"The garnishee is entitled to know within a reasonable time whether the plaintiff intends to claim that he is liable upon his answer beyond the liability admitted therein, or, if none be admitted, that upon the facts stated he is liable for some amount; and consequently, if the plaintiff does not move for judgment upon the answer, as he may, under the provision of law above quoted, and does not give him notice that he claims nothing of him except the amount admitted to be due, or, if nothing be admitted, that he claims nothing, and consents to a dismissal of the proceedings, he has the right to move the court to dismiss the proceedings against him as 'a matter of right.'" *Selz v. First Nat. Bank of Ft. Atkinson*, 55 Wis. 225, 12 N. W. 433.

Garnishees having been summoned in November to answer at the following January term, at which time the cause was continued by consent without answer, held, that on filing their answer denying liability two days after the opening of the following August term the garnishees were properly discharged on motion without notice to the plaintiff because of his failure to prosecute, and a motion for a new trial, filed by the plaintiff September 9th,—seven days after he learned that the garnishee had been discharged,—was properly denied. *Dunham v. Murphy* (Tex. Civ. App.) 28 S. W. 132.

⁵ *Graham v. Chappell*, 24 Wis. 38; *Hanaford v. Hawkins* (R. I.) 28

ings upon the answer;⁶ nor after issue is formed upon the answer, except on trial, unless the plaintiff has lost his right to a trial;⁷ but the plaintiff must exercise proper diligence in pursuing his remedy.⁸

Notice of Application for Judgment.

§ 384. In garnishments upon judgments, when issue has been formed upon the answer of the garnishee, the cause stands in very much the same condition as an ordinary action after issue joined. If either party desires the matter terminated, he will notice it for trial, the same as he would any action.⁹ There are decisions declaring that in all cases the garnishee, after answering, is bound to take notice of whatever is done in the case;¹⁰ but certainly, when a garnishee, in re-

Atl. 605; *National Bank of Galena v. Chase*, 71 Iowa, 120, 32 N. W. 202.

⁶ *McWilliams v. Standard Guano & Chemical Co.*, 92 Ga. 437, 17 S. E. 669; *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. 818; *Hanaford v. Hawkins* (R. I.) 28 Atl. 605; *Hess v. Shorb*, 7 Pa. St. 231; *Myers v. Smith*, 29 Ohio St. 120; *Pennsylvania Ry. Co. v. Peoples*, 31 Ohio St. 537; *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 South. 589. See, also, ante, §§ 360-362.

⁷ *Waco State Bank v. Stephenson Manuf'g Co.*, 4 Tex. Civ. App. 137, 23 S. W. 234.

⁸ *Goulding v. Hair*, 133 Mass. 78. See, also, ante, §§ 365, 382, note.

⁹ *Vincent v. Wellington*, 18 Wis. 159; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548; *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. 1009.

¹⁰ *Chase v. Foster*, 9 Iowa, 429; *Mandeville v. Askew*, 78 Ga. 18.

Stone, C. J.: "After the written answer of the garnishees had been filed, the court, on motion of the plaintiff, made an order * * * requiring garnishees to 'appear in open court, and make oral answer.' * * * Having failed to appear and answer orally as required by the order of the court, a judgment nisi was rendered against them, * * * and a scire facias was issued, requiring them to appear at the next term, and show why such judgment nisi should

sponse to the garnishment summons, appears and answers, confessing liability, which answer the plaintiff accepts as true by not taking issue upon it, the case stands confessed, there is no issue to be tried, and the plaintiff may move the court for judgment upon the answer without giving the garnishee any notice of the motion,¹¹ unless required by the statute,¹² and then it may be waived.¹³ The same rule holds when the garnishee confesses liability by not responding to the garnishment summons.¹⁴ The garnishee should give the plaintiff notice of a motion to be discharged, for, if

not be made final, * * * and, failing to show cause, the conditional judgment against them was made absolute. * * * During the same term, but at a later day, the garnishees appeared by themselves and counsel, and moved the court to set aside the judgment final. * * * It is certainly the law that after the garnishees were summoned, and filed a written answer through counsel, both they and their counsel are presumed to have been present in court ever afterwards, until the cause was finally disposed of in that court. *Duffee v. Buchanan*, 8 Ala. 27; *Harrington v. Meadors*, 41 Ala. 274; *Speed v. Cocke*, 57 Ala. 209, 222. We are forced by this necessary rule to indulge the conclusive presumption that they were present in court when the order was made requiring them, as garnishees, to appear in court, and answer orally. *Security Loan Ass'n v. Weems*, 69 Ala. 584. So the conclusion is irresistible that they were guilty of laches up to this stage." *Talladega Mercantile Co. v. McDonald*, 97 Ala. 508, 12 South. 34.

¹¹ *Mead v. Doe*, 18 Wis. 31; *Leigh v. Smith*, 5 Ala. 583; *Talladega Mercantile Co. v. McDonald*, 97 Ala. 508, 12 South. 34; *Chase v. Foster*, 9 Iowa, 429.

When the defendant appeals from the judgment against the garnishee, the latter is constructively before the appellate court, and is bound by any order it may make. *Daniels v. Clark*, 38 Iowa, 556.

¹² *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121.

¹³ *Bigalow v. Barre*, 30 Mich. 1.

¹⁴ *Sturges v. Kendall*, 2 La. Ann. 565; *Henry v. Bryce*, 11 La. Ann. 691.

discharged without the plaintiff's knowledge, the court will set aside the order discharging him upon the motion of the plaintiff within any reasonable time thereafter, on showing that he just learned of such discharge.¹⁵

Judgment cannot be Rendered before Judgment in Main Action.

§ 385. No judgment, except for defaults, can be rendered against the garnishee till judgment against the defendant has been recovered in the main action.¹⁶ Therefore, in the absence of statutory regulation, both causes will usually be set for the same term of court,

¹⁵ *McWilliams v. Standard Guano & Chemical Co.*, 92 Ga. 437, 17 S. E. 669; *Mortland v. Little*, 137 Mass. 339.

¹⁶ *Laidlaw v. Morrow*, 44 Mich. 547, 550, 7 N. W. 191; *Streisguth v. Reigelman*, 75 Wis. 499, 43 N. W. 1117; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3; *Railroad Co. v. Todd*, 11 Heisk. (Tenn.) 549; *Gaines v. Beirne*, 3 Ala. 114; *Leigh v. Smith*, 5 Ala. 583; *Lowry v. Clements*, 9 Ala. 422; *Bostwick v. Beach*, 18 Ala. 80; *Case v. Moore*, 21 Ala. 758; *Battell v. Lowery*, 46 Iowa, 49; *Merchants' & Manufacturers' Nat. Bank v. Haiman*, 80 Ga. 624, 5 S. E. 795; *Smith v. Montoya*, 3 N. M. 39, 1 Pac. 175; *Brackon v. Ballentine*, 16 N. J. Law, 484; *McPhee v. Gomer* (Colo. App.) 41 Pac. 836; *Roberts v. Barry*, 42 Miss. 260; *Metcalf v. Steele*, Id. 511; *Kellogg v. Freeman*, 50 Miss. 127; *Erwin v. Heath*, Id. 795; *Withers v. Fuller*, 30 Grat. (Va.) 547; *Housemans v. Heilbron*, 23 Ga. 186; *Arnold v. Gullatt*, 68 Ga. 810; *Bryan v. Dean*, 63 Ga. 317; *Caldwell v. Townsend*, 5 Mart. (N. S.; La.) 307; *Proseus v. Mason*, 12 La. 16; *Rose v. Whaley*, 14 La. Ann. 374; *Collins v. Friend*, 21 La. Ann. 7; *Coda v. Thompson*, 39 W. Va. 67, 19 S. E. 548; *Washburn v. New York & V. Min. Co.*, 41 Vt. 50.

DEFENDANT CANNOT OBJECT: The entry of judgment against the garnishee before judgment against the defendant cannot be complained of by the latter. *Carper v. Richards*, 13 Ohio St. 219. But see *Barton v. Smith*, 7 Iowa, 85.

Held, that the entry of personal judgment against the defendant in an attachment suit before entry of judgment against the garnishee amounts to a dismissal of the garnishment. *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150.

and the garnishment will be brought on as soon as the other is disposed of, but the failure of the plaintiff to proceed to judgment against the garnishee at the same term at which he recovered against the defendant will not prevent his doing so afterwards.¹⁷

Judgment by Default.

Entering and Setting Aside.

§ 386. If either party defaults at any stage of the proceedings, judgment may be entered against him therefor,¹⁸ and a negligent garnishee is no more en-

¹⁷ Gibbons v. Cherry, 53 Md. 144; Sturges v. Kendall, 2 La. Ann. 565; Robinson v. Starr, 3 Stew. (Ala.) 90; Leigh v. Smith, 5 Ala. 583. See, also, ante, §§ 364-366. Compare Langford v. Ottumwa W. P. Co., 53 Iowa, 415, 5 N. W. 574.

¹⁸ Parmenter v. Childs, 12 Iowa, 22; Lehman v. Hudmon, 85 Ala. 135, 4 South. 741; Freeman v. Miller, 51 Tex. 443, 53 Tex. 372. See ante, § 296, as to default for not answering.

DEFAULT OF PLAINTIFF: Garnishment proceedings in justice court are as effectually ended by the failure of the plaintiff to appear on the return of the summons to the garnishee to show cause why judgment should not be entered against him as they would be by the failure of the plaintiff to appear on the return of the first summons. The subsequent appearance of both plaintiff and garnishee and entry of judgment against the garnishee without objection cannot reinstate the proceedings so as to protect the garnishee. Johnson v. Dexter, 38 Mich. 695.

"Failure to enter a writ on the return day is a discontinuance of the action, but, as the court has the power to permit the action to be entered late, if application is made within a certain time, unless that time has expired, it cannot be known that the action may not ultimately be entered in court." Varian v. New England Mut. Acc. Ass'n, 156 Mass. 1, 30 N. E. 368. Held, that a garnishee acting in good faith may safely pay the defendant when the writ is not returned in season, and before he receives notice of intention to enter it late. *Id.*

titled to protection than any other negligent party.¹⁹ A party in default is *prima facie* negligent, and can obtain no relief, unless by rebutting the presumption of negligence he can induce the court to set aside the judgment, and grant him leave to set up and prosecute his defense.²⁰ He must also show that he has a

¹⁹ *Lehman v. Hudmon*, 85 Ala. 135, 4 South. 741; *Houston v. Wolcott*, 7 Iowa, 173; *Fifield v. Wood*, 9 Iowa, 250; *Burlington & M. R. Ry. Co. v. Hall*, 37 Iowa, 620; *Parmenter v. Childs*, 12 Iowa, 22; *Dolby v. Tingley*, 9 Neb. 412, 2 N. W. 866; *Willet v. Price*, 32 Ga. 115; *Freidenrich v. Moore*, 24 Md. 295; *Anderson v. Graff*, 41 Md. 601; *Lawrence v. Smith*, 45 N. H. 533; *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163.

But there are differences in the nature of the proceedings which are entitled to be considered. *Evans v. Mohn*, 55 Iowa, 302, 7 N. W. 593.

²⁰ *Carhart v. Ross*, 15 Ga. 186; *Homans v. Coombe*, 2 Cranch, C. C. 681, Fed. Cas. No. 6,653; *Platen v. Byck*, 50 Ga. 245.

EXCUSING DEFAULT: A judgment by default against an insane garnishee should be set aside, and the garnishee allowed to plead, when the fact is shown. *Bond v. Neuschwander*, 86 Wis. 391, 57 N. W. 54.

Held, that a default will not be set aside after the term unless a strong case is shown. *Anderson v. Graff*, 41 Md. 602.

EQUITABLE RELIEF: It is not a case in which a court of equity will interfere to grant relief, though he show that the judgment is inequitable. To entitle himself to equitable relief the garnishee must not only show that injustice has been done him by the judgment, but that it was obtained without any fault or neglect on his part. *Drake, Attachm.* § 658e, citing *Hair v. Lowe*, 19 Ala. 224; *Peters v. League*, 13 Md. 58; *Windwart v. Allen*, Id. 196; *Atlantic F. & M. Ins. Co. v. Wilson*, 5 R. I. 479; *Rhode Island Exch. Bank v. Hawkins*, 6 R. I. 198; *Danaher v. Prentiss*, 22 Wis. 311; *Freeman v. Miller*, 51 Tex. 443, 53 Tex. 372; *Oregon R. & N. Co. v. Gates*, 10 Or. 514. See, also, *Day v. Welles*, 31 Conn. 344; *Houston v. Wolcott*, 7 Iowa, 173; *Burlington & M. R. Ry. Co. v. Hall*, 37 Iowa, 620; *Melton v. Lewis*, 74 Tex. 411, 12 S. W. 93; *Tillis v. Prestwood* (Ala.) 18 South. 134.

meritorious defense.²¹ It rests in the sound discretion of the court to set aside the judgment upon application and cause shown or refuse to do so, and, whether set aside or not, the action of the court will not be reviewed upon appeal unless its discretion has been abused.²² The defaulted party should move to have the default set aside, and for a new trial.²³

Nature and Effect of.

§ 387. Under some statutes the default of the garnishee only renders him liable for contempt of court, and he is brought in by attachment of his person, the same as if summoned as a witness.²⁴ Under others only a conditional judgment liable to be made absolute

²¹ *Fifield v. Wood*, 9 Iowa, 249; *Parmenter v. Childs*, 12 Iowa, 22; *Wilson v. Phillips*, 5 Ark. 183.

²² *Talladega Mercantile Co. v. McDonald*, 97 Ala. 508, 12 South. 34; *United States Exp. Co. v. Bedbury*, 34 Ill. 459; *Russell v. Freedmen's Sav. Bank*, 50 Ga. 575; *New England Mut. Acc. Ass'n v. Varian*, 151 Mass. 17, 23 N. E. 579; *Rose v. Whaley*, 14 La. Ann. 374; *Evans v. Mohn*, 55 Iowa, 302, 7 N. W. 593; *McDonald v. Finney*, 87 Iowa, 529, 54 N. W. 476.

CAPTIOUS DEFAULT: A garnishee having appeared ready to answer, by an arrangement with plaintiff's attorneys the taking of his answer was deferred. It was no abuse of discretion to set aside a default entered against the garnishee after he went away relying on the agreement. *Hueskamp v. Van Leuven*, 56 Iowa, 653, 10 N. W. 240.

FORGETFULNESS: Setting aside a default suffered by the mere forgetfulness of the garnishee is not an abuse of discretion. *Evans v. Mohn*, *supra*.

²³ *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

²⁴ *Hibernia Savings & Loan Soc. v. Superior Court of Inyo Co.*, 56 Cal. 265; *Brown v. Moore*, 61 Cal. 432; *Smith v. Gower*, 3 Metc. (Ky.) 171; *Giles v. Hicks*, 45 Ark. 271; *Sherman v. Cohen*, 2 Strob. (S. C.) 553; *McDonald v. Rennel*, 21 Law Rep. 157, Fed. Cas. No. 8,765.

on scire facias can be rendered in such cases.²⁵ Under others he is in the same position as any defendant against whom default has been entered; the liability being admitted, but not the amount, the latter must be proved before final judgment can be rendered.²⁶ Under others he thereby becomes liable to satisfy any judgment recovered in the main action, whatever it may be.²⁷ Under others no final judgment against the garnishee can be had in the garnishment suit either by default or otherwise, but the liability there established by answer or default must be enforced by an independent action brought against the garnishee for that pur-

²⁵ *Williams v. Vanmetre*, 19 Ill. 293; *Horat v. Jackel*, 59 Ill. 139.

²⁶ *Flanagan v. Earnest*, 1 Chand. (Wis.) 149, 164; *Lewis v. Faul*, 29 Ark. 470; *Longwell v. Hartwell*, 164 Pa. St. 533, 30 Atl. 495; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

²⁷ *Born v. Williams*, 81 Ga. 796, 7 S. E. 868; *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697; *Stockberger v. Lindsey*, 65 Iowa, 471, 21 N. W. 782; *Harmon v. Harwood*, 35 Vt. 211.

DEFAULT—LAW CONSTITUTIONAL: Having suffered default to be entered against him under a statute declaring that in such cases the plaintiff might maintain an action on the case against him to satisfy the judgment recovered against the defendant, a garnishee attempted to avoid liability on the ground that the law authorizing the action was in conflict with the constitution, in that it deprived him of his property without a jury trial, and without due process of law. The court say: "This would undoubtedly be true if he had not already had an opportunity to show the amount, and by showing to limit his liability to it. The question is whether, having once had and neglected or refused the opportunity, he is entitled to have it a second time, or whether it is within the power of the legislature to provide that upon proof of such neglect or refusal he may be charged to the full extent of the original judgment in consequence of such neglect or refusal without regard to the estate in his hands. We know of no reason why it has not such a power. No authority is cited to show that it has not." *Vaughan v. Furlong*, 12 R. I. 127.

pose.²⁸ Under others default renders him liable to absolute judgment for the full amount claimed against him not exceeding the amount of the plaintiff's recovery against the defendant.²⁹

Scire Facias and Proof of Regularity on.

§ 388. It is also frequently provided that in cases of default, before absolute judgment shall be rendered against a garnishee for any amount, or before execution shall issue against his property, he shall be served with a second summons to show cause why such judgment should not be rendered,³⁰ or such execution is-

²⁸ *Giles v. Hicks*, 45 Ark. 271; *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Wingfield v. McLure*, 48 Ark. 510, 3 S. W. 439. See, also, ante, § 354.

But the presumption is that the affidavit in garnishment is true. The garnishee fails at his peril to answer, and, in the absence of evidence, a judgment for the full amount of the judgment in the main action is correct. *First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. 290.

²⁹ *Wilson v. Phillips*, 5 Ark. 183; *Sarlouis v. Freeman's Ins. Co. of Baltimore*, 45 Md. 241; *Post v. Bowen*, 35 Md. 232, 46 Am. Dec. 345; *Layman v. Beam*, 6 Whart. (Pa.) 181; *Jones v. Tracy*, 75 Pa. St. 417.

³⁰ *Williams v. Vanmetre*, 19 Ill. 293; *Horat v. Jackel*, 59 Ill. 139; *Meeker v. Sanders*, 6 Iowa, 61; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121. See, also, ante, § 316.

The statute allowing judgment to be made absolute on return of two such notices "Not found," held, that the first notice must be issued returnable at the next term of court, and returned "Not found," before the second could issue, and reasonable effort must be made to find the garnishee. *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

NOTICE NOT JURISDICTIONAL: Held, that failure to serve this notice is merely error, for which the absolute judgment may be set aside on application within a reasonable time. *Tillis v. Prestwood* (Ala.) 18 South. 134.

sued.³¹ Before default can be entered against a garnishee, there must be positive proof or sufficient evidence in court of due service of process upon him,³² and all the requirements of the statute in other respects must have been complied with.³³

Judgment on the Pleadings.

§ 389. The garnishee's answer may show an absolute liability, or the plaintiff may be content to rest his case upon it, or desire to know whether, in the opinion of the court, it is necessary to make any further showing to be entitled to judgment against the garnishee; or, failing to take further proceedings upon it within the time allowed by law, the garnishee may desire to have the matter disposed of. In any of these cases a motion may be presented to the court to render judgment upon the showing made by the rec-

³¹ *Fifield v. Wood*, 9 Iowa, 249; *Duncan v. Sangamo Fire Ins. Co.*, 35 Iowa, 20; *Langford v. Ottumwa W. P. Co.*, 53 Iowa, 415, 5 N. W. 574.

³² *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3; *Lehigh Val. Ins. Co. v. Fuller*, 81 Pa. St. 398.

A written admission of service, purporting to be signed by the garnishee, is not sufficient. *Johnson v. Delbridge*, 35 Mich. 436.

³³ *Lehman v. Hudmon*, 79 Ala. 532; *Bonner v. Martin*, 37 Ala. 83; *Goode v. Holcome*, Id. 94; *Johnson v. McCutchings*, 43 Tex. 533; *Griswold v. Popham*, 1 Duv. (Ky.) 170.

AFFIDAVIT STATING AMOUNT: Without the required affidavit a writ of garnishment was issued, naming the amount of the judgment against the defendant as \$220.87, when it was \$2,020.87. Judgment by default against the garnishee for the latter amount was set aside because for more than the amount specified in the writ, and the writ was quashed because there was no affidavit. *Hoffman v. Simon*, 52 Miss. 302.

ord, and this motion is in the nature of a demurrer.³⁴ When the plaintiff asked the court for judgment upon the answer before taking issue upon it, it was held that upon the overruling of his motion the court should enter final judgment discharging the garnishee, and that the plaintiff could not, after demanding and receiving the judgment of the court upon the answer, take issue upon and proceed to contest it, for that would, in effect, give him another trial.³⁵ But, having taken issue upon the answer, and demanded a trial thereof, it was held that the plaintiff might well ask the opinion of the court whether it was necessary to introduce any testimony to show the liability of the garnishee, and that the court cannot render final judgment discharging the garnishee upon overruling the plaintiff's motion for judgment upon the pleadings.³⁶ Upon this motion judgment will be rendered in favor of the garnishee, unless his liability clearly appears;³⁷ but, if the admissions of the answer clearly show liability, judgment will be rendered against the garnishee upon the plaintiff's motion, though issue has not been taken upon the answer, and it positively denies liability.³⁸ When the garnishee answers by way of confession and avoidance, and thus assumes the af-

³⁴ *Davis v. Pawlette*, 3 Wis. 300, 306, 62 Am. Dec. 690; *Platt v. Sauk Co. Bank*, 17 Wis. 222.

³⁵ *Mahoney v. McLean*, 28 Minn. 63, 9 N. W. 76.

³⁶ *Johann v. Rufener*, 30 Wis. 671.

If the parties proceed to controvert the answer by evidence upon the hearing of the motion for judgment on the answer, the court may render final judgment upon denying the motion. *Murphree v. City of Mobile (Ala.)* 18 South. 740.

³⁷ See ante, § 314.

³⁸ *Grever v. Culver*, 84 Wis. 295, 54 N. W. 585; *Curtis v. Bradford*, 33 Wis. 190. See, also, ante, § 313.

firmative, if he refuses to put in evidence, it is held that the plaintiff should move the court to direct the jury to return a verdict in his favor, and if, instead of so doing, he moves the court for judgment upon the pleadings, the motion should be denied.*

Setting Aside Judgments.

§ 390. A court of general jurisdiction, having rendered any judgment in a garnishment proceeding, may, in the exercise of its discretion, upon cause shown, set the same aside in the same manner as it might in any other action,³⁹ and upon the same principle justices of the peace and other inferior courts, not of record, have no power to vacate any judgment rendered by them. When the judgment is rendered, the justice loses all authority to do anything further except issue execution or return the case to a higher court on appeal. If a justice assumes to set aside a judgment he has rendered, even though all the parties consent thereto, any judgment he may afterwards render will be simply void.⁴⁰

*Willis v. Holmes (Or.) 42 Pac. 989.

³⁹ See ante, § 386; First Nat. Bank v. Mellen, 45 Mich. 413, 8 N. W. 80.

"It is familiar doctrine that a court has control over its records to alter or amend them, during the term at which they are entered. If, therefore, the last order of distribution was proper, the court committed no error in rescinding the first." Stahl v. Webster, 11 Ill. 511, 515.

"The judgments of the court are in the breast of the judge until the final adjournment of the term, and may be set aside or modified during the term." Talladega Mercantile Co. v. McDonald, 97 Ala. 508, 12 South. 34.

⁴⁰ McCormick Harvesting Mach. Co. v. James, 84 Wis. 600, 54 N. W. 1088; Hamill v. Champlin, 12 R. I. 124.

Nature and Amount of the Judgment.

Some Statutes Allow no Final Judgment against the Garnishee.

§ 391. Under many statutes no judgment can be rendered in the garnishment proceedings against the garnishee, whether his liability is established or not. Garnishment under these statutes is intended merely to operate as an assignment of the defendant's rights to the plaintiff, enabling him to sue the garnishee as the defendant might do. If the garnishee admits liability, these statutes authorize the court to make an order directing him to pay or deliver the property into court, or to the plaintiff in garnishment; but obedience of the order can only be enforced by an action by the plaintiff against the garnishee, as in ordinary cases, and cannot be compelled by execution against the garnishee's property,⁴¹ nor by imprisonment of the gar-

⁴¹ *Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Arthur v. Hale*, 6 Kan. 99; *Giles v. Hicks*, 45 Ark. 271; *St. Louis, I. M. & S. Ry. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56; *Rice v. Whitney*, 12 Ohio St. 358; *Secor v. Witter*, 39 Ohio St. 218; *Conover v. Conover*, 17 N. J. Law, 187.

ORDER ENFORCEABLE BY EXECUTION: Held, that in garnishment, after judgment obtained in the main action, this order may be enforced by execution. *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 18 Neb. 303, 25 N. W. 94.

Such order is final and enforceable by execution only on a liability admitted by the garnishee. *Clark v. Foxworthy*, 14 Neb. 241, 15 N. W. 342.

UNAUTHORIZED JUDGMENT—INJUNCTION: When a final judgment is rendered without authority, and execution issued thereon, the garnishee is entitled to a perpetual injunction to restrain enforcement of the judgment and execution. *Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846.

An order that the garnishee pay to the plaintiff held erroneous. It should be an order that the plaintiff may sue. *Deering v. Richardson-Kimball Co. (Cal.)* 41 Pac. 81.

nishee for contempt, which would, in effect, be imprisonment for debt.⁴² Such an order is not a final determination of the rights of the parties so as to prevent inquiry in respect to them in the action thereon, but simply enables the plaintiff to sue as the defendant might.⁴³ But most statutes authorize an absolute judgment to be rendered against the garnishee, and enforced by execution as in ordinary cases.⁴⁴

⁴² *West Side Bank v. Pugsley*, 47 N. Y. 368; *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 254; *Edgerton & Wilcox v. Hanna, Garretson & Co.*, 11 Ohio St. 323; *Welch v. Pittsburgh, Ft. W. & C. Ry. Co.*, 11 Ohio St. 569.

The garnishee being imprisoned for contempt in not obeying the order to pay into court, held that: "The whole proceeding of the district court was irregular. It was the duty of the court simply to render a judgment against the garnishee for the amount found due, and the order to pay the same into court was improper." *Brummagim v. Boucher*, 6 Cal. 16.

⁴³ *Trustees of Bacon Academy v. De Wolf*, 26 Conn. 602; *Rice v. Whitney*, 12 Ohio St. 358; *Board of Education v. Scoville*, 13 Kan. 18; *Phelps v. Atchison, T., etc., R. Co.*, 28 Kan. 165; *Mull v. Jones*, 33 Kan. 112, 5 Pac. 388; *Linder v. Murdy*, 37 Kan. 152, 14 Pac. 447; *Bank of Le Roy v. Harding* (Kan. App.) 41 Pac. 680; *Hollingsworth v. Fitzgerald*, 16 Neb. 492, 20 N. W. 836; *Parker v. Page*, 38 Cal. 522; *Penyan v. Berry*, 52 Ark. 130, 12 S. W. 241; *Atlantic & Pac. Ry. Co. v. Hopkins*, 94 U. S. 11.

The plaintiff is not entitled, as of right, to litigate anew on a scire facias the sum for which one summoned as trustee, in a trustee process, shall be charged, if that question has been tried and determined in the original suit, and the amount paid for which the trustee was there held chargeable. *Brown v. Tweed*, 2 Allen, 566; *Jarvis v. Mitchell*, 99 Mass. 530. But see *Trustees of Bacon Academy v. De Wolf*, 26 Conn. 602.

⁴⁴ *De Witt v. Kelly*, 18 Or. 557, 23 Pac. 666; *How. Ann. St. Mich.* §§ 8042, 8090.

The plaintiff may maintain an action of debt on a money judgment against the garnishee. *Chandler v. Warren*, 30 Vt. 510.

Limited in Amount by Liability of Defendant and Garnishee.

§ 392. This judgment is limited in amount by the plaintiff's recovery in the principal suit,⁴⁵ and the amount he sought to recover in the garnishment suit,⁴⁶ and cannot be more than the established liability of the garnishee.⁴⁷

⁴⁵ Strong v. Hollon, 39 Mich. 411; Timmons v. Johnson, 15 Iowa, 23; Hitchcock v. Watson, 18 Ill. 289; Gen. St. Minn. c. 66, § 187.

⁴⁶ AMOUNT STATED IN AFFIDAVIT: In holding absolute judgment by default against a garnishee for more than was claimed in the affidavit to be erroneous, the supreme court of Alabama say: "Affidavit and garnishment are the commencement of a suit. They disclose what is sought to be recovered. It need scarcely be stated that in judgment by default no greater sum can be recovered than is claimed." Carroll v. Milner, 93 Ala. 301, 9 South. 221. See, also, Hoffman v. Simon, 52 Miss. 302.

When the affidavit in garnishment mentioned no amount, it was held that judgment for any amount was erroneous. Stickley v. Little, 29 Ill. 315.

On summons to show cause why execution should not issue against him, failure to answer the summons does not render the garnishee liable to an increased judgment. Langford v. Ottumwa W. P. Co., 53 Iowa, 415, 5 N. W. 574.

IN ILLINOIS the judgment against the garnishee in courts of record must be for the whole amount of his liability to the defendant, and not merely for enough to pay the plaintiff's judgment. Stahl v. Webster, 11 Ill. 511; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Webster v. Steele, 75 Ill. 544; Kern v. Chicago Co-operative Brewery Ass'n, 140 Ill. 371, 29 N. E. 1035. But in justice courts the judgment is limited to the amount of the plaintiff's recovery, instead of being for the whole amount of the garnishee's liability, as in the circuit court. Pomeroy v. Rand, McNally & Co. (Ill. Sup.) 41 N. E. 636.

IN NEW JERSEY the judgment should be for the amount of the * garnishee's liability to the extent of the total demand of all creditors entitled to share in the division of the garnished money. Lomerson v. Hoffman, 24 N. J. Law, 674; Young v. Delaware, L. & W. Ry. Co., 38 N. J. Law, 502.

⁴⁷ Longwell v. Hartwell, 164 Pa. St. 533, 30 Atl. 495; Wilcox v.

Judgment for Property in Garnishee's Possession and Debts not Payable in Money.

§ 393. From the universal principle that the garnishee is in no case to be placed in a worse position than if sued by the principal defendant, unless by his own fault,⁴⁸ it also follows that when the garnishee is charged because of possessing property belonging to the defendant no absolute judgment for any amount in money can be had against him unless upon his refusal to turn over the garnished property on a proper demand;⁴⁹ and when he is charged as debtor of the defendant, and his obligation to the defendant was payable in anything other than money, he cannot be

Mills, 4 Mass. 218; Jarvis v. Mitchell, 99 Mass. 530; Talbot v. Tarlton, 5 J. J. Marsh. (Ky.) 641, 644; Burrus v. Moore, 63 Ga. 405; Brown v. Silsby, 10 N. H. 521.

ERRONEOUS JUDGMENT: But if judgment is erroneously given for a greater amount, the garnishee's only remedy is by appeal. The judgment may be enforced if not appealed from. Bigelow v. Barre, 30 Mich. 1; Burlington & M. R. Ry. Co. v. Hall, 37 Iowa, 620.

AGAINST INSOLVENT GARNISHEE: The fact that the garnishee is insolvent is no reason why judgment should not be rendered against him for the full amount of his liability to the defendant. Judgment should be rendered for the full amount, and the plaintiff would then receive a proportionate share with other creditors. Birmingham Nat. Bank v. Mayer (Ala.) 16 South. 520.

⁴⁸ See ante, § 48.

⁴⁹ Rasmussen v. McCabe, 43 Wis. 471; Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518; Fountain v. Smith, 70 Iowa, 282, 30 N. W. 635; Carter v. Koshland (Or.) 11 Pac. 292; Longwell v. Hartwell, 164 Pa. St. 533, 30 Atl. 495; Compare Lorenz v. King, 38 Pa. St. 93.

When the garnishee is charged for promissory notes in his possession, owned by him and the defendant jointly, he cannot be required to pay in money one-half of the face of the notes before collection nor to surrender the notes, but should be ordered to pay the

charged for an absolute money judgment unless on his refusal to pay to the plaintiff or the officer holding the plaintiff's execution, according to his agreement with the defendant.⁵⁰ In such cases the judgment should

defendant's share of the money when collected. *Cox v. Russell*, 44 Iowa, 556.

CONVERSION: When it appears that the garnishee has converted the property to his own use, a judgment for its value is correct. *Thayer v. Partridge*, 47 Vt. 423.

PROPERTY HELD TO DEFRAUD CREDITORS: When property is held by the garnishee for the purpose of defrauding the creditors of the defendant the conveyance to him is void, and no judgment can be rendered against the garnishee for any amount in money. A judgment should be rendered for the specific property. *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46; *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039. Contra, *Sutton v. Hasey*, 58 Wis. 556, 17 N. W. 416; *Ferguson v. Hillman*, 55 Wis. 181, 12 N. W. 389.

JUDGMENT FOR VALUE OF PROPERTY NO PROTECTION: "A garnishee answered before a justice of the peace that he had three hundred pounds of pork in his hands, belonging to the defendant, whereupon the justice rendered judgment against the defendant for the value of the pork. The garnishee did not appeal from this judgment within the time prescribed by law, but brought the case into the circuit court by certiorari, where the judgment of the justice was quashed. * * * The judgment of the justice of the peace is void, and not merely erroneous. The justice had no power to render a judgment for money. It should have ordered the pork to be delivered up for sale." *Barrett v. Thomas*, Thomp. Tenn. Cas. 67. This case was approved and followed in *Byrn v. Blackman*, 94 Tenn. 569, 29 S. W. 961, in which case it was held that a judgment for the value of the property is no defense to a garnishment seeking to reach the property itself, because "the only instance in which a personal judgment may be rendered against the garnishee is when he refuses to deliver up the property. * * * There was no demand made for the note by the officer serving the garnishment, nor refusal by the garnishee to surrender it, nor an indorsement of that fact upon the execution, as required by the act."

⁵⁰ See ante, § 116.

be conditional; that is, that the garnishee deliver the property of the defendant held by him to the officer holding the execution issued on the judgment in the principal suit; or that the garnishee pay to such officer according to the contract with the defendant proved by such garnishee, and that upon his failure or refusal to do so upon demand the plaintiff's judgment become absolute for a specified amount in money, and that the plaintiff have execution therefor.⁵¹

For Unmatured Debts—Following Affidavit.

§ 394. When the debt for which the garnishee is charged is not yet due, the judgment should be made payable at the time the debt is to become due, and execution should be stayed till then;⁵² and, in case there are previous garnishments, not yet disposed of, should be limited to the amount that shall remain after the

⁵¹ Stadler Bros. & Co. v. Parmlee, 14 Iowa, 175; Rasmussen v. McCabe, 43 Wis. 471; Layman v. Beam, 6 Whart. (Pa.) 181; Hurst v. Home Protection Fire Ins. Co., 81 Ala. 174, 1 South. 209.

The plaintiff is entitled to a judgment for the value of the property to the extent of the amount of the judgment against the debtor, with costs of the proceedings, to be satisfied out of the property, wherever it may be found; and, in case it cannot be found, or a sufficient portion thereof to satisfy the amount of said judgment and costs, the amount remaining due thereon may be satisfied out of the property of the garnishee not exempt from execution. Carter v. Koshland, 13 Or. 615, 12 Pac. 58, modifying the same case as reported in 12 Or. 492, 8 Pac. 556, and 11 Pac. 292. The latest decision above is approved in De Witt v. Kelly, 18 Or. 557, 23 Pac. 666.

CONTEMPT PROCEEDINGS TO ENFORCE OBEDIENCE: Held, that the order of the court that the garnishee pay over the sum by the verdict of the jury found in his hands may and ought to be enforced by attachment for contempt. Sherman v. Cohen, 2 Strobbh. (S. C.) 553; Cheatham v. Seawright, 30 S. C. 101, 8 S. E. 526.

⁵² See ante, § 126.

previous garnishments are satisfied; and to determine this, of course the proceedings will have to be stayed till a final disposition of the other matters.⁵³ It is also a general principle that no judgment can be rendered against the garnishee except in the capacity in which the proceedings against him were instituted.⁵⁴

The Judgment Record—Form and Substance.

Entitling—Combining.

§ 395. The garnishment judgment should be entitled in the name of the plaintiff against the defendant in garnishment as garnishee of the defendant in the main action,⁵⁵ and should be entered up separate from the judgment against the principal defendant;⁵⁶

⁵³ See ante, § 190; *Scott v. Windham* (Miss.) 16 South. 206.

⁵⁴ See ante, §§ 50, 363.

Held, that a joint judgment may be rendered against garnishees summoned severally. *Boyd v. Rutledge*, 25 Iowa, 271.

⁵⁵ In garnishment proceedings entitled and conducted in the case of *Lindsley v. Watson*, a judgment entered against the garnishee entitled "*Lindsey v. Watson*" is erroneous, "*Lindsley*" and "*Lindsey*" not being idem sonans. *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697.

IN ILLINOIS the judgment is docketed in the name of the defendant against the garnishee, and for the use of the plaintiff and all other creditors entitled by law to share in the proceeds. *Stahl v. Webster*, 11 Ill. 511; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Hitchcock v. Watson*, 18 Ill. 289; *Gillilan v. Nixon*, 26 Ill. 50; *Farrell v. Pearson*, Id. 463; *Rankin v. Simonds*, 27 Ill. 352; *Cariker v. Anderson*, Id. 358; *Towner v. George*, 53 Ill. 168; *Webster v. Steele*, 75 Ill. 544; *Warne v. Kendall*, 78 Ill. 598; *Imperial Fire Ins. Co. v. Gunning*, 81 Ill. 236; *Ham v. Beery*, 39 Ill. App. 341.

⁵⁶ *Atchison v. Rosalip*, 4 Chand. (Wis.) 12; *Fasquelle v. Kennedy*, 55 Mich. 305, 21 N. W. 347; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3.

But an order that the garnishee pay to the plaintiff in a state in

and the judgments against several garnishees should be entered up separately,⁵⁷ although they were summoned on the same writ.⁵⁸ But failure to docket the judgments separately, though an irregularity, does not render them void.⁵⁹ The form of the record will not be rigidly regarded in considering the validity of the judgment.⁶⁰

Recitals and Averments—Time of Recording.

§ 396. The record of the case should be made up at the time the proceedings occurred, but failure in this regard will not affect the validity of the judgment.⁶¹ The judgment entry should recite the fact

which no judgment can be rendered against the garnishee, held a proper part of the judgment against the principal defendant. *Jarvis v. Mitchell*, 99 Mass. 530.

A JOINT JUDGMENT cannot be rendered against the defendant and garnishee. *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891.

The form for a joint decree against the debtor and garnishee in a chancery garnishment is given by the court in *Gilmore v. Miami Bank*, 3 Ohio, 503.

⁵⁷ *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. 111; *Conover v. Conover*, 17 N. J. Law, 187.

A joint judgment against garnishees summoned severally has been sustained on appeal because of the failure of the appellant to preserve the evidence on which the court acted. *Boyd v. Rutledge*, 25 Iowa, 271.

⁵⁸ *Page v. Baldwin*, 29 Vt. 428.

⁵⁹ *Fasquelle v. Kennedy*, 55 Mich. 305, 21 N. W. 347; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3; *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. 111; *Contra, Atchison v. Rosalip*, 4 Chand. (Wis.) 12.

⁶⁰ *Rasmussen v. McCabe*, 43 Wis. 471.

⁶¹ *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525; *Bushnell v. Allen*, 48 Wis. 460, 4 N. W. 599; *Gatchell v. Foster*, 94 Ala. 622, 10 South. 434; *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520; *Jackson v. St. Louis & S. F. Ry. Co.*, 89 Mo. 104, 1 S. W. 224.

A judgment by a justice against a garnishee will not be reversed

and amount of the judgment in the main action,⁶² and show the nature, amount, and ground of the gar-

because of the failure of the justice to docket the return of the process on which the garnishee was summoned. *Houston v. Walcott & Co.*, 1 Iowa, 86.

⁶² *Chambers v. Yarnell*, 37 Ala. 400; *Faulks v. Heard*, 31 Ala. 516; *Brake v. Curd Sinton Manuf'g Co.*, 102 Ala. 339, 14 South. 773; *Barton v. Smith*, 7 Iowa, 85; *Bean v. Barney*, 10 Iowa, 498; *Toll v. Knight*, 15 Iowa, 370; *Alley v. Myers*, 2 Tenn. Ch. 206; *Drake, Attachm.* § 658a.

RECITING PRINCIPAL JUDGMENT—AMENDMENT: "The recitation, however, of the fact and amount is the duty of the clerk, and its omission may be corrected on motion. *Whorley v. Railroad Co.*, 72 Ala. 20; *Randolph v. Little*, 62 Ala. 396; *Boyd v. Rutledge*, 25 Iowa, 271; *Jackson v. St. Louis & S. F. Ry. Co.*, 89 Mo. 104, 1 S. W. 224. The omission to recite the fact and amount of the judgment against the original defendant is an irregularity not affecting its validity when collaterally assailed." *Gatchell v. Foster*, 94 Ala. 622, 10 South. 434. *Contra*, *Barton v. Smith*, 7 Iowa, 85.

"After the appeal was taken, however, the judgment against the garnishee was amended nunc pro tunc in the circuit court, so that it now contains the necessary recitals. * * * This amendment was well made in our opinion, even after the lower court had lost control of the cause by appeal; * * * and the case stands before us now as if the judgment originally written up had been free from this infirmity." *Birmingham Nat. Bank v. Mayer* (Ala.) 16 South. 520.

"The true rule is this: That in a garnishment proceeding under an attachment or summons the record in such proceeding and in the principal suit are to be read together, and it is sufficient if the whole record shows that a judgment has been rendered against the principal defendant. The rule contended for is only applicable where a statute gives a garnishment proceeding upon a judgment without execution." *Bushnell v. Allen*, 48 Wis. 460, 468, 4 N. W. 599.

A statement that judgment has been rendered in the main action, giving the title of that action, is a distinct reference to the original judgment. *Boyd v. Rutledge*, 25 Iowa, 271.

Judgment against the defendant may be entered nunc pro tunc after judgment is entered against the garnishee, and the latter judg-

nishee's liability for which it is rendered,⁶³ and that all the statutory prerequisites to rendering judgment have been complied with;⁶⁴ but it need not, in terms, express that it is in satisfaction of the garnishee's liability to the defendant, though that is its legal effect.⁶⁵ It is the garnishee's duty to see to it that the judgment against him is properly recorded, and any payment of it by him before such record is made is wholly voluntary, and at his peril.⁶⁶

ment is as valid as if the other had been first entered. *Capital City Bank v. Wakefield*, 83 Iowa, 46, 48 N. W. 1059.

⁶³ *Cunningham v. Hogan*, 136 Mass. 407; *Speak v. Kinsey*, 17 Tex 301; *King v. Hyatt*, 41 Pa. St. 229.

It should carefully guard the garnishee's rights. *Scott v. Windham* (Miss.) 16 South. 206. See, also, ante, § 393.

When the garnishee is tenant of the judgment debtor, a judgment against the garnishee, subrogating the plaintiff to the statutory lien of the judgment debtor as landlord on the crops of the tenant need not state the amount or value of the crops, but should identify the premises on which they are grown. *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563.

It should set out the amount of costs adjudicated in the proceedings and in the principal suit, but the omission may be supplied in the supreme court or in the court below on motion, if the record furnishes sufficient data. *Randolph v. Little*, 62 Ala. 396.

⁶⁴ See ante, § 213.

⁶⁵ *Stadler v. Parmlee*, 14 Iowa, 175

The proper form in Illinois is given in *Stahl v. Webster*, 11 Ill. 511, approved in *Hitchcock v. Watson*, 18 Ill. 289.

⁶⁶ *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150.

CHAPTER XIX.**COSTS AND EXECUTION.****§ 397. Costs in General.**

398. Costs when Garnishee is Charged.

399. Costs when Garnishee is Discharged—Without Contest.

400. — Upon Trial.

401. Costs on Appeal.

402. Execution.

Costs in General.

§ 397. Costs, when given by the court, must be taxed at the time the judgment is rendered,¹ and by the court rendering,² and are a part of the judgment.³ When afterwards called to account by the defendant, the garnishee can deduct only such costs as were assessed in the garnishment suit,⁴ and an order allowing the garnishee costs without notice to the defendant, and made after the garnishment proceedings are

¹ *Laclair v. Reynolds*, 50 Vt. 418; *Selz v. First Nat. Bank of Ft. Atkinson*, 60 Wis. 246, 19 N. W. 43; *Jackson v. St. Louis & S. F. Ry. Co.*, 89 Mo. 104, 1 S. W. 224; *Ladd v. Cousins*, 52 Mo. 451; *Keating v. American Refrigerator Co.*, 32 Mo. App. 293.

Costs may be taxed when the scire facias is tried if not taxed before. *Croxford v. Massachusetts Cotton Mills*, 15 Gray (Mass.) 70.

² *Laclair v. Reynolds*, 50 Vt. 418.

³ *Winne v. Lenawee Circuit Judge*, 74 Mich. 329, 42 N. W. 279; *Randolph v. Little*, 62 Ala. 396; *Speak v. Kinsey*, 17 Tex. 301; *Hannibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249.

⁴ *Schwerin v. De Graff*, 19 Minn. 414 (Gil. 359); *Adams v. Penzell*, 40 Ark. 531; *State v. Bick*, 36 Mo. App. 114. But see *Blaisdell v. Bowers*, 40 Vt. 126.

Costs which the garnishee unnecessarily allows to accumulate in the proceedings he cannot charge to his creditor. *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978.

dismissed, is void.⁵ When the proceedings were discontinued because of the death of the defendant, it was held that neither party could have an order for costs.⁶ The correctness of the judgment in respect to costs cannot be reviewed on a motion for a modification of the judgment on appeal,⁷ nor upon exception and assignment of error without a motion to the court taxing the costs to rectify the error.⁸ If the garnishment is disposed of by trial, as in ordinary actions, the same rules as to costs should govern.⁹ Costs are usually regulated to a large extent by statute, and, unless so provided for,¹⁰ cannot be demanded as of right, but rest in the sound discretion of the court, and cannot be reviewed on appeal.¹¹ Costs are, as a rule, allowed for travel and attendance to answer the garnishment summons,¹² and for continued attendance

⁵ *Kaufman v. Hude*, 37 Mich. 123.

⁶ *Farnesworth v. Page*, 17 N. H. 334.

⁷ *Kraft v. Raths*, 45 Mich. 20, 7 N. W. 232.

⁸ *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

⁹ *Crocker v. Baker*, 18 Pick. (Mass.) 407, 413; *Peninsular Stove Co. v. Circuit Judge of Wayne Co.*, 85 Mich. 400, 48 N. W. 549.

¹⁰ *Morrison v. McDermott*, 6 Allen, 122; *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. 723; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775.

¹¹ *White v. Kilgore*, 78 Me. 323, 5 Atl. 70; *Rollins v. Allison*, 59 Vt. 188, 10 Atl. 201; *Kent v. Hutchins*, 50 N. H. 92; *Hawkins v. Graham*, 128 Mass. 20.

Improper allowance of costs corrected on appeal in the following cases: *Darnell v. Wood*, 82 Ga. 556, 9 S. E. 282; *Holbrook v. Waters*, 19 Pick. (Mass.) 354; *Senior v. Brogan*, 66 Miss. 178, 6 South. 649; *Bernheim v. Brogan*, 66 Miss. 184, 6 South. 649.

¹² *Wilcox v. Mills*, 4 Mass. 218; *Westphal, Hinds & Co. v. Clark*, 42 Iowa, 371; *Stockberger v. Lindsey*, 65 Iowa, 471, 21 N. W. 782; *Goodrich v. Hopkins*, 10 Minn. 162 (Gil. 130); *McConnell v. Rakness*, 41 Minn. 3, 42 N. W. 539; *National Union Bank v. Brainerd*, 65 Vt.

so long as is necessary,¹³ for counsel fees in preparing the answer,¹⁴ and such other necessary expenses as the court deemed reasonable;¹⁵ and in case issue is made up between the plaintiff and garnishee, and tried, the costs of the trial as in other actions, including attorney fees.¹⁶

291, 26 Atl. 723; *Lackett v. Rumbaugh*, 45 Fed. 23; *How. Ann. St. Mich.* §§ 8031, 8035.

Only actual travel and expenses can be taxed. *Hunt v. Miles*, 42 Vt. 533.

¹³ *Morrison v. McDermott*, 6 Allen, 122; *Washburn v. Clarkson*, 123 Mass. 319; *Hawkins v. Graham*, 128 Mass. 20; *Kellogg v. Waite*, 99 Mass. 501.

COSTS FOR ATTENDANCE WHILE MAIN ACTION IS PENDING: A garnishee is not entitled to fees for continued attendance during the litigation between the plaintiff and defendant, but only for the term at which his answer was made. *Hoyt v. Sprague*, 29 Mass. 406; *Wasson v. Bowman*, 117 Mass. 91; *Hawkins v. Graham*, 128 Mass. 20.

The extent to which garnishees may properly appear in court from time to time during the pendency of the main action must in each case be determined upon the circumstances attending it. But in all cases they would be entitled to tax for their travel and attendance for at least one term. *Croxford v. Massachusetts Cotton Mills*, 81 Mass. 70; *Holbrook v. Waters*, 19 Pick. 354, 356.

¹⁴ *Johnston v. Blanks*, 68 Tex. 495, 4 S. W. 557; *Willis v. Heath*, 75 Tex. 124, 12 S. W. 971; *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614; *Carter v. Bush*, 79 Tex. 29, 15 S. W. 167; *Holbrook v. Waters*, 19 Pick. 354; *Rollins v. Allison*, 59 Vt. 188, 10 Atl. 201; *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. 723.

The fact that the counsel who prepared the answer is one of the garnishees is immaterial. *Holbrook v. Waters*, 19 Pick. 354.

Costs cannot be recovered for making superfluous answers. *Gerry v. Gerry*, 10 Allen, 160.

¹⁵ *Moore v. Read*, 84 Ga. 658, 11 S. E. 558; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Moody v. Carroll*, 71 Tex. 143, 8 S. W. 510.

¹⁶ *O'Reilly v. Cleary*, 8 Mo. App. 186. *Contra*, *Darnell v. Wood*,

Costs when the Garnishee is Charged.

§ 398. When the garnishee makes no active opposition to the proceedings it is not the design of the law, nor is it justice, to mulct him with costs.¹⁷ These must be taxed against the garnished property,¹⁸ and the garnishee may retain sufficient to reimburse his expense in the proceeding,¹⁹ although his right to do so is not specially stated in the statute;²⁰ and, if that is not sufficient to pay them, may have judgment and

82 Ga. 556, 9 S. E. 282; *Holbrook v. Waters*, 19 Pick. 354; *Hawkins v. Graham*, 128 Mass. 20.

An attorney fee of \$250 was held unwarranted when the good faith of the transaction between the garnishee and the defendant was the question at issue. *Senior v. Brogan*, 66 Miss. 178, 6 South. 649; *Bernheim v. Brogan*, 66 Miss. 184, 6 South. 649.

¹⁷ *Johnson v. Delbridge*, 35 Mich. 437; *Gracy v. Coates*, 2 McCord (S. C.) 224; *Little Wolf River Imp. Co. v. Jackson*, 66 Wis. 42, 49, 27 N. W. 625; *Randolph v. Heaslip*, 11 Iowa, 37; *Langford v. Ottumwa W. P. Co.*, 53 Iowa, 415, 5 N. W. 574.

¹⁸ *Cleveland v. Clap*, 5 Mass. 201; *Talbot v. Tarleton*, 5 J. J. Marsh. (Ky.) 641; *Prout v. Grout*, 72 Ill. 457.

When it appears that the garnishee has sufficient in his hands out of which to pay the whole of the plaintiff's claim and costs, held that there was no error in charging him with costs. *Williams v. Housel*, 2 Iowa, 154; *Baltimore & O. Ry. Co. v. Taylor*, 81 Ind. 24; *Frederick v. Easton*, 40 Pa. St. 419; *Witherspoon v. Barber*, 3 Stew. (Ala.) 335.

¹⁹ *Holbrook v. Waters*, 19 Pick. (Mass.) 354; *Croxford v. Massachusetts Cotton Mills*, 15 Gray (Mass.) 70; *Harnibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249; *Walcott v. Lenawee Circuit Judge* (Mich.) 65 N. W. 286.

But he cannot retain the costs incurred in a subsequent suit in which he is summoned as garnishee. *Bullard v. Hicks*, 17 Vt. 198.

²⁰ *Crone v. Braun*, 23 Minn. 239; *Clark v. Gresham*, 67 Miss. 203, 7 South. 223; *Baker v. Lancashire Ins. Co.*, 52 Wis. 193, 8 N. W.

execution against the plaintiff for the balance.²¹ But if he assumes the attitude of a litigant, and upon the trial of the issue formed is found liable when he denied liability, or if greater liability is established against him than he admitted, he may be charged with a judgment for costs, the same as any other party who conducts an unsuccessful defense, although there be no statute on the subject.²² But if his admitted liability, and no more, be proven upon the trial, he is not chargeable with costs,²³ but recovers his costs.²⁴

611; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630. Contra, *Adams v. Cordis*, 8 Pick. (Mass.) 260.

He cannot have a judgment therefor against the plaintiff, but should have judgment against the defendant. *Llano Improvement & Furnace Co. v. Castanola* (Tex. Civ. App.) 23 S. W. 1016.

²¹ *Jarvis v. Mitchell*, 99 Mass. 530; *Hills v. Smith*, 28 N. H. 369, Contra, *Llano Improvement & Furnace Co. v. Castanola* (Tex. Civ. App.) 23 S. W. 1016.

²² *Strong v. Hollon*, 39 Mich. 411; *Jackson v. Leelanaw Circuit Judge* (Mich.) 65 N. W. 230; *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380; *Newlin v. Scott*, 26 Pa. St. 102; *Lucas v. Campbell*, 88 Ill. 447; *Hannibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249; *Robinson v. Smith*, 63 Mich. 350, 29 N. W. 858; *Chase v. Manhardt*, 1 Bland (Md.) 344; *Albert v. Albert*, 78 Md. 338, 28 Atl. 388; *Thompson v. Allen*, 4 Stew. & P. (Ala.) 184; *Haydock Carriage Co. v. Pier*, 78 Wis. 579, 47 N. W. 945; *Walker v. Wallace*, 2 Dall. (U. S.) 113.

A garnishee is rendered liable for costs only by a refusal to answer, or by conduct seeking to avoid a fair investigation of his liability. *Randolph v. Heaslip*, 11 Iowa, 37.

He cannot, then, as against the plaintiff, have his costs taxed against the property in his hands. *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775; *Bernheim v. Brogan*, 66 Miss. 184, 6 South. 649.

²³ *Prout v. Grout*, 72 Ill. 456; *Newlin v. Scott*, 26 Pa. St. 102; *Breeding v. Seigworth*, 29 Pa. St. 396; *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. 723; *Randolph v. Heaslip*, 11 Iowa, 37; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. 379; *Conant v. Burns* (N. H.) 19 Atl. 11.

²⁴ *How. Ann. St. Mich.* § 8073.

Costs when the Garnishee is Discharged.

Without Contest.

§ 399. When the garnishee is discharged upon his answer,²⁵ or because of the plaintiff's abandonment of or failure to prosecute the proceedings,²⁶ or when the garnishment is dissolved by defendant giving bond when the garnishee is nevertheless required to answer,²⁷ or has answered or appeared,²⁸ he is usually allowed a judgment against the plaintiff for costs to cover the expense of his travel and attendance, the fees of counsel who prepared his answer, and such other necessary expense as the court, in its discretion, may deem reasonable.²⁹ But when the plaintiff does not, after answer made, seek to establish the garnishee's liability by following up the proceedings, taking issue upon and contesting the answer, costs cannot be taxed as in an action. Such a practice would make it extremely hazardous for a plaintiff to issue a garnishment process in any case, and would tend to defeat the purpose of the statute in allowing the rem-

²⁵ Moore v. Read, 84 Ga. 658, 11 S. E. 558; Willis v. Heath, 75 Tex. 124, 12 S. W. 971; Phillips v. Wilson, 1 Pin. (Wis.) 513; Bul-lard v. Hicks, 17 Vt. 198. But see McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539.

²⁶ Noble v. Bourke, 44 Mich. 193, 6 N. W. 237.

²⁷ Rome R. Co. v. Richmond & D. R. Co., 60 Fed. 43. But see Kaufman v. Hude, 37 Mich. 123.

²⁸ Page v. Baldwin, 29 Vt. 428.

²⁹ Kellogg v. Waite, 99 Mass. 501; Cheatham v. Seawright, 30 S. C. 101, 8 S. E. 526. See, also, ante, § 397.

Counsel fees cannot be taxed in favor of the garnishee in justice court Miller v. Williams, 30 Vt. 386.

edy, which should always be as cheap and practicable as possible.³⁰

Upon Trial.

§ 400. When the plaintiff contests the garnishee's answer, and fails to sustain his contention on the trial, costs are usually given the garnishee against him, the same as they would be in favor of any defendant who succeeds in maintaining his defense.³¹ But this is by no means the universal rule, especially when the good faith of the transactions between the defendant and the garnishee is the question at issue.³² In determining whether such a case of fraud is made out as to render the garnishee liable for costs, though the jury find a verdict in his favor, the court may act either upon the finding of the jury or its own view of the evidence;³³ and for costs incurred by the fault of the garnishee he is liable, regardless of whether he is charged or not.³⁴

Costs on Appeal.

§ 401. A party who successfully prosecutes an appeal cannot be taxed with the costs of the appeal.³⁵

³⁰ *Selz v. First Nat. Bank of Ft. Atkinson*, 55 Wis. 225, 12 N. W. 433; *Wolcott v. Lenawee Circuit Judge* (Mich.) 65 N. W. 286.

³¹ *Hill v. Smith*, 28 N. H. 369.

A garnishee discharged on contest, cannot charge his expenses against the property in his hands belonging to the claimant. *Wolcott v. Lenawee Circuit Judge* (Mich.) 65 N. W. 286.

³² *Senior v. Brogan*, 66 Miss. 178, 6 South. 649; *Bernheim v. Brogan*, 66 Miss. 184, 6 South. 649.

³³ *Kent v. Hutchins*, 50 N. H. 92.

³⁴ *Hanson v. Butler*, 48 Me. 80; *Wearne v. Haynes*, 13 Nev. 103.

³⁵ *Winne v. Lenawee Circuit Judge*, 74 Mich. 329, 42 N. W. 278.

When the garnishee appeals, and the judgment appealed from is affirmed by the appellate court, he is not entitled to any costs accruing after the appeal,³⁶ and may be charged with the plaintiff's costs.³⁷ But when he is successful in his appeal he is entitled to all his costs,³⁸ unless the success was obtained on a different showing of facts than those made in the lower court; for, if the judgment of the lower court was correct on the facts before it, the garnishee cannot have costs.³⁹ When the plaintiff appeals from a judgment in favor of the garnishee, and succeeds in the appellate court, he is entitled to a judgment for costs against the garnishee;⁴⁰ and if he fails the garnishee has a judgment for costs against him. But when the court of its own motion dismisses the plaintiff's appeal, no costs will be awarded to the garnishee.⁴¹ A garnishee cannot recover costs for attendance in the appellate court on the appeal of the principal case nor on the appeal

³⁶ Ball v. Gilbert, 12 Metc. (Mass.) 397, 405; Kellogg v. Waite, 99 Mass. 501.

³⁷ Goddard v. Collins, 25 Vt. 712.

³⁸ Lorman v. Phoenix Ins. Co., 33 Mich. 65; Weirich v. Scribner, 44 Mich. 73, 6 N. W. 91.

³⁹ Lee v. Babcock, 5 Mass. 212.

⁴⁰ Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; Phillips v. Wilson, 1 Pin. (Wis.) 513. But see Holbrook v. Waters, 19 Pick. (Mass.) 354.

If the garnishee appeals, and fails in the supreme court, he cannot tax his costs, but must pay costs to the plaintiff. But when he follows the case to the supreme court upon an appeal by the plaintiff he does not become an actor, or assume the attitude of a litigant, and is therefore entitled to tax his costs although the judgment of the lower court is modified in favor of the plaintiff. Goddard v. Collins, 25 Vt. 712.

⁴¹ First Nat. Bank v. Mellen, 45 Mich. 413, 8 N. W. 80.

from the judgment between the plaintiff and claimant, except for necessary attendance.⁴² But, so far as his attendance is necessary, he is entitled to costs.⁴³

Execution.

§ 402. Under most of the garnishment statutes the final judgment in the garnishment proceedings may be enforced by execution, as in other cases,⁴⁴ and all the garnishee has to do to avoid personal liability and costs is to deliver the garnished property to the officer holding the execution on the garnishment judgment;⁴⁵ and by such payment he does not waive any right he may have to reverse the judgment by appeal, because the payment is not voluntary.⁴⁶ But no execution can issue till the judgment is entered. Execution issued on the order of court that judgment be rendered against the garnishee is premature, and will afford the

⁴² Kellogg v. Waite, 99 Mass. 501; O'Donnell v. McIntire, Id. 551.

⁴³ Morrison v. McDermott, 6 Allen (Mass.) 122; Croxford v. Massachusetts Cotton Mills, 15 Gray (Mass.) 70.

⁴⁴ De Witt v. Kelly, 18 Or. 557, 23 Pac. 666; Bigalow v. Barre, 30 Mich. 1.

Held, that the order should be enforced by attachment for contempt. Sherman v. Cohen, 2 Scrob. (S. C.) 553; Cheatham v. Seawright, 30 S. C. 101, 8 S. E. 526. See ante, § 391.

JUDGMENT AGAINST RECEIVERS: When judgment is rendered against a receiver as garnishee, the judgment cannot be enforced by execution, but only by order of the court appointing the receiver, for the execution would interfere with the exclusive control of the appointing court. Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987.

⁴⁵ Nash v. Gale, 2 Minn. 310 (Gil. 265); Storm v. Cotzhausen, 38 Wis. 139, 143; How. Ann. St. Mich. § 8044.

⁴⁶ Watson v. Kane, 31 Mich. 61.

officer no protection.⁴⁷ It has generally been held that this judgment cannot be collected by garnishment.⁴⁸ When an order is made, which, from its nature, cannot be enforced by execution,—as when the garnishee is ordered to dispose of property in his hands, pay his own claim out of it, and account to the plaintiff for the balance,—supplemental proceedings in the nature of an application for an order requiring the garnishee to account afford an appropriate means to rendering the garnishment effectual.⁴⁹

⁴⁷ *Langdon v. Thompson*, 25 Minn. 509.

⁴⁸ *Illinois Cent. Ry. Co. v. Weaver*, 54 Ill. 319; *Wolf v. Tappan*, 5 Dana (Ky.) 361. Contra, *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204.

⁴⁹ *McDonald v. Creager* (Iowa) 65 N. W. 1021.

CHAPTER XX.

APPEALS.

§ 403. Right to Appeal—No Party can Complain of a Judgment against Another.

404. — Each Party must Appeal for Himself.

405. — Right to Appeal Statutory.

406. From What Appeal Lies.

407. Effect of Appeal.

408. The Record.

409. The Action of the Appellate Court.

Right to Appeal.

No Party can Complain of a Judgment against Another.

§ 403. The garnishee cannot appeal from the judgment in the main action,¹ and on the appeal of the garnishment suit he cannot take advantage of any irregularities in the main action not going to the jurisdiction of the court.² He cannot by appeal ask to have the judgment against the claimant reversed.³ On the other hand, the defendant cannot appeal from the judgment against the garnishee,⁴ unless his ex-

¹ Mead v. Doe, 18 Wis. 31.

² Ante, § 226.

³ Alamo Ice Co. v. Yancey, 66 Tex. 187, 18 S. W. 499; Germania Sav. Bank v. Peuser, 40 La. Ann. 796, 5 South. 75.

⁴ Kellogg v. Waite, 99 Mass. 501; Miere v. Brush, 3 Scam. (Ill.) 21; Welch v. Pittsburgh, F. W. & C. Ry. Co., 11 Ohio St. 569; Lichtenberg v. Hosmer Circuit Judge (Mich.) 63 N. W. 963. CONTRA, Sinard v. Gleason, 19 Iowa, 165; Daniels v. Clark, 38 Iowa, 556; Hurlburt v. Hicks, 17 Vt. 193; Kalisky v. Currey, 9 Baxt. (Tenn.) 214.

When the judgment in the main action is not shown to be unjust, and the garnishee does not appeal, the garnishment judgment

empt property is involved,⁵ or he can vacate it, and take it up by appealing the main action; ° nor from the judgment against the claimant.⁷ After appeal by the garnishee the defendant cannot maintain certiorari.⁸ But appeal lies by one garnishee from a judgment discharging his cogarnishee when his own liability would thereby be increased.⁹

Each Party must Appeal for Himself.

§ 404. Neither the garnishee,¹⁰ the claimant,¹¹ nor the defendant ¹² can intervene or claim any rights under an appeal prosecuted by either of the others.

will not be disturbed on the defendant's appeal. *Fanning v. Minnesota Ry. Co.*, 37 Iowa, 379.

When the right to appeal is given by statute, the court will not disturb the judgment on the ground that the garnishee colluded with the plaintiff. *Barber v. Walker*, 26 Wis. 44.

When there was a joinder in error by the defendant and garnishee, held, if the defendant could not complain of errors in the proceedings against the garnishee, the latter could. *Hodson v. McConnel*, 12 Ill. 170.

The defendant cannot take advantage of clerical errors in the proceedings against the garnishee. *Carper v. Richards*, 13 Ohio St. 219.

⁵ *Wilson v. Bartholomew*, 45 Mich. 41, 7 N. W. 227; *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 655, 57 N. W. 1050; *Wigwall v. Union Coal & Mining Co.*, 37 Iowa, 129; *Webster v. City of Lowell*, 2 Allen, 123.

⁶ *Webster v. City of Lowell*, 2 Allen, 123.

⁷ *McNeill v. Kyle*, 86 Ala. 338, 5 South. 461; *Miere v. Brush*, 4 Ill. 21.

⁸ *Lichtenberg v. Hosmer Circuit Judge* (Mich.) 63 N. W. 963.

⁹ *Creasap v. Bower*, 41 Iowa, 210.

¹⁰ *Bryant v. Bigelow*, 9 Lea (Tenn.) 135.

When the garnishee joins with the defendant in the same writ, held, that his rights may be considered. *Hodson v. McConnel*, 12 Ill. 170.

¹¹ *Alamo Ice Co. v. Yancey*, 66 Tex. 187, 18 S. W. 499.

¹² *Cowan v. Lowry*, 7 Lea (Tenn.) 620.

Each must take his own appeal.¹³ They cannot join.¹⁴ But a joint judgment against a number of garnishees may be appealed from on one writ of error.¹⁵

Right to Appeal Statutory.

§ 405. Appeal, as distinguished from the common-law writ of error, is a purely statutory creation, and the fact that the statute does not give the right to appeal in any particular case is a sufficient reason for saying that the right does not exist.¹⁶ But garnishment proceedings do not involve the same parties or issues as the main action, and either the plaintiff or garnishee may, as matter of right, under the general statute authorizing appeals in civil cases, appeal from the judgment rendered therein,¹⁷ although the main action is not appealed.¹⁸ And most of the garnishment statutes provide that appeals may be taken as

¹³ *Atcheson v. Smith*, 3 B. Mon. (Ky.) 502; *Pupke v. Meador*, 72 Ga. 230.

¹⁴ *Johnson v. Plimpton*, 30 Vt. 420.

¹⁵ *Sulter v. Brooks*, 74 Ga. 401. Compare *Cairo & St. L. R. Co. v. Hindman*, 85 Ill. 521.

¹⁶ *Prince v. Heenan*, 5 Minn. 347 (Gil. 279); *Church v. French*, 54 Vt. 420.

¹⁷ *Allen v. Partlow*, 3 S. C. 417; *Kayser v. Bauer*, 5 Kan. 202; *Strickland v. Maddox*, 4 Ga. 393; *Bebb v. Preston*, 1 Iowa, 460; *Van Buskirk v. Martin*, 28 Vt. 726; *Patterson v. Harland*, 12 Ark. 158; *Welsh v. Noyes*, 10 Colo. 133, 14 Pac. 317; *White v. Washington School Dist.*, 45 Conn. 59.

The right of the principal defendant to appeal from the judgment against him under trustee process proceedings exists under the general appeal statute, though not given by the statute under which the proceedings are conducted. *Allen v. Seaver*, 38 Vt. 673.

¹⁸ *Albachten v. Chicago, St. P. & K. C. Ry. Co.*, 40 Minn. 378, 42 N. W. 86; *Bebb v. Preston*, 1 Iowa, 460; *Johnson v. Plimpton*, 30 Vt. 420; *Van Buskirk v. Martin*, 28 Vt. 726.

in other cases.¹⁹ An intervening claimant may appeal from a judgment for costs against him.²⁰

From What Appeal Lies.

§ 406. That only orders and judgments final in their nature, and affecting the substantial rights of the parties, are appealable, is a general rule, applicable to garnishments as to other forms of action.²¹ The difficulty is in determining in practice what orders and judgments come within the rule. It has been held that no appeal lies from an order for final judgment against the garnishee, but only from the judgment when entered,²² and the same is held of an order requiring a garnishee to pay money into court.²³ Yet the clerk may reduce the order to the form of a judgment, and from this appeal may be maintained;²⁴ and the same court holds that an order discharging the garnishee may be appealed from before final judgment is entered upon it,²⁵ and before final judgment in the main action.²⁶ It is held in Massachusetts that

¹⁹ *Newell v. Blair*, 7 Mich. 103, 106; *Church v. French*, 54 Vt. 420.

²⁰ *Kimpson v. Hunt*, 4 Iowa, 340.

²¹ *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80; *Moore v. Hill*, 87 Ga. 91, 13 S. E. 259.

²² *Croft v. Miller*, 26 Minn. 317, 4 N. W. 45.

²³ *Williams v. Brechler*, 75 Wis. 309, 43 N. W. 952; *Eilers v. Wood*, 64 Wis. 422, 25 N. W. 440.

²⁴ *Albachten v. Chicago, St. P. & K. C. Ry. Co.*, 40 Minn. 378, 42 N. W. 86.

²⁵ *McConnell v. Rakness*, 41 Minn. 3, 42 N. W. 539; *National Bank of Galena v. Chase*, 71 Iowa, 120, 32 N. W. 202.

²⁶ *Albachten v. Chicago, St. P. & K. C. Ry. Co.*, 40 Minn. 378, 42 N. W. 86; *Turpin v. Coates*, 12 Neb. 321, 11 N. W. 300; *National Bank of Galena v. Chase*, 71 Iowa, 120, 32 N. W. 202.

appeal does not lie from a ruling in favor of the claimant until it has been embodied in a judgment between the plaintiff and garnishee, discharging the latter so far as the claimant's rights are upheld;²⁷ and in Alabama that an order discharging a garnishee before judgment in the main action is not appealable.²⁸ An order directing the garnishee to answer more fully does not go to the merits of the case, and is not appealable,²⁹ and an order allowing the garnishee to file an answer is of the same nature.³⁰ The formal order charging or discharging the garnishee, which is not an adjudication of the plaintiff's right to charge him, but merely ground for issuing a scire facias, is not final, and therefore not appealable.³¹ It is held that error by the defendant does not lie from an order overruling the motion to discharge the garnishee, made before judgment in the main action, because the order was not a final adjudication of the garnishee's liability;³² but the same order, made after judgment in the main action, is held to be final, and on it defendant may bring error;³³ and the same is held of an order that the garnishee pay money into court,³⁴ and

²⁷ *Gifford v. Rockett*, 119 Mass. 71; *First Nat. Bank v. Mellen*, 45 Mich. 413, 8 N. W. 80.

²⁸ *Terry v. Hughes*, 93 Ala. 432, 8 South. 686.

²⁹ *Lusk v. Galloway*, 52 Wis. 164, 8 N. W. 608.

³⁰ *Moore v. Hill*, 87 Ga. 91, 13 S. E. 259.

³¹ *Tweedy v. Nichols*, 27 Conn. 519; *Robinson v. Mason*, Id. 270.

³² *Miller v. Noyes*, 34 Kan. 13, 7 Pac. 602; *Kansas City, St. J. & C. B. Ry. Co. v. Gough*, 35 Kan. 1, 10 Pac. 89, 94.

³³ *Carlyle v. Smith*, 36 Kan. 614, 14 Pac. 156.

Such an order held appealable, and an order denying a motion to set it aside held not appealable. *Deering v. Richardson-Kimball Co.* (Cal.) 41 Pac. 801.

³⁴ *Furstenheim v. Adams*, 42 Ark. 283.

an order adjudging him in contempt for not obeying such order.³⁵ Whether an order that the plaintiff's traverse of the garnishee's answer be stricken from the files is a final and appealable order has been doubted.³⁶ An order taxing costs before judgment is not appealable independent of the final judgment,³⁷ but, if made after final judgment, it is.³⁸ The main action may be appealed, though no judgment has been rendered in the garnishment suit.³⁹ If an order or a judgment is final, appeal is usually the only remedy.⁴⁰ The question whether a particular order or judgment is appealable should be raised by motion to dismiss the appeal.⁴¹ *Mandamus* is the proper remedy to put aside oppressive interlocutory orders when the action of the court is without legal foundation,⁴² but cannot

³⁵ *Hagerman v. Tong Lee*, 12 Nev. 331.

³⁶ "Perhaps there is a distinction between cutting the plaintiff off in his appointed remedies for prosecuting the case and forcing upon him defensive pleadings in behalf of the garnishee." *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259.

³⁷ *Walmer v. Shulenberger*, 23 Ind. 454.

³⁸ *Selz v. First Nat. Bank of Ft. Atkinson*, 60 Wis. 246, 19 N. W. 43.

³⁹ *Hayes v. Stewart*, 23 Vt. 622.

⁴⁰ *U. S. v. Swan*, 13 C. C. A. 77, 65 Fed. 647; *Burlington & M. R. Ry. Co. v. Hall*, 37 Iowa, 620; *Bigalow v. Barre*, 30 Mich. 1; *Carroll v. Parkes*, 57 Tenn. 269; *Durant v. Staggers*, 2 Nott. & McC. (S. C.) 488.

Being out of the course of the common law, held, that *certiorari* is the proper method to obtain a review. *Curtis v. Steever*, 36 N. J. Law, 304.

When an erroneous judgment is rendered against the garnishee, he cannot obtain relief by bringing an action in the name of the defendant against the plaintiff on the ground that the judgment in the main action was unauthorized. *Braynard v. Burpee*, 27 Vt. 616.

⁴¹ *Furstenheim v. Adams*, 42 Ark. 285.

⁴² *Townsend v. Cass Circuit Judge*, 39 Mich. 407.

be employed to obtain a review of orders in cases where there is an adequate remedy by error or appeal.⁴³

Effect of Appeals.

§ 407. The appeal of the garnishment proceedings has no effect on the main action.⁴⁴ An appeal of the main action by the principal defendant suspends,⁴⁵ and by force of statute in some states discontinues, the ancillary garnishment proceeding,⁴⁶ the appeal bond taking the place of the security acquired by the garnishment.⁴⁷ A reversal of the judgment against the defendant in the main action vacates the judgment against the garnishee rendered before the appeal was taken.⁴⁸ If the court has jurisdiction and renders a judgment against the garnishee, who regularly pays it, neither the subsequent reversal of it nor of the judgment in the main action, upon the defendant's motion or appeal, will render the garnishee liable to him

⁴³ *Ex parte Hurn*, 92 Ala. 102, 9 South. 515.

⁴⁴ *Jarvis v. Mitchell*, 99 Mass. 530; *Cowan v. Lowry*, 7 Lea (Tenn.) 620.

The defendant cannot intervene on the garnishee's appeal. *Cowan v. Lowry*, above. In Massachusetts no judgment can be rendered against the garnishee separate from the judgment in the main action except on scire facias, and it is there held that the plaintiff waives his appeal against the garnishee by taking judgment against the defendant before the appeal is decided. *Jarvis v. Mitchell*, 99 Mass. 530.

⁴⁵ *Kaylor v. Brunswick*, 6 Heisk. (Tenn.) 235.

⁴⁶ How. Ann. St. Mich. § 8041.

⁴⁷ *Bushey v. Rath*, 45 Mich. 181, 185, 7 N. W. 802.

⁴⁸ *Clough v. Buck*, 6 Neb. 343; *Rowlett v. Lane*, 43 Tex. 274; *Smith v. Kansas City, St. J. & C. B. Ry. Co.*, 49 Mo. App. 54; *Mitchell v. Watson*, 9 Fla. 160; *Withington v. Southworth*, 26 Mich. 381.

for the amount paid on the garnishment judgment,⁴⁹ or enable the garnishee to recover it from the plaintiff in garnishment.⁵⁰ The defendant's remedy is by action against the plaintiff for money received to his use.⁵¹ At common law a writ of error was a superseas of execution from the time of its allowance, and the court issuing it would stay proceedings on the judgment while the writ was pending. But when the statute substituting an appeal in the place of the common-law writ of error provided that, if a stay is desired, a bond with sufficient surety shall be executed by the appellant, or some one for him, it was held that the plain purpose of the statute was to change the common-law rule. Therefore, when a chancery garnishment was dissolved by a decree providing that, if the plaintiff should give bond in a specified sum within 30 days, the garnishment should remain in full force, and the plaintiff, within the 30 days, appealed, but gave bond for the costs of the appeal only, the court held that the appeal without the bond was not sufficient to prevent the garnishee from paying to his creditor, and was therefore no ground for stay of execution against the garnishee upon a judgment recovered against him by his creditor.⁵² Judgment for the defendant in the main action, unless appealed from within the time allowed by law therefor, entitles the garnishee to be discharged;⁵³ but an appeal by the

⁴⁹ *Troyer v. Schweizer*, 15 Minn. 241 (Gil. 187); *Richardson v. Hickman*, 22 Ind. 244; *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534.

⁵⁰ *Duncan v. Ware*, 5 Stew. & P. (Ala.) 119.

⁵¹ *Allen v. Seaver*, 38 Vt. 673; *Elliot v. Sneed*, 1 Scam. (Ill.) 517.

⁵² *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534.

⁵³ *Suydam v. Huggefords*, 23 Pick. (Mass.) 465; *Peterson v. Hays*,

plaintiff from the judgment rendered against him in the main action preserves his lien on the garnished property,⁵⁴ and the garnishment proceedings, being merely ancillary,⁵⁵ necessarily go with the main action to the appellate court,⁵⁶ unless judgment has been

85 Iowa, 14, 51 N. W. 1143; *Sherrod v. Davis*, 17 Ala. 312; *State v. Cunningham*, 9 Neb. 146, 1 N. W. 1011.

WHETHER COURT MAY DISCHARGE GARNISHEE BEFORE TIME FOR APPEAL EXPIRES: Held, that the justice who rendered the judgment in the main action against the plaintiff has no authority to discharge the garnishee thereon till the time for appeal has expired. *Erickson v. Duluth, S. S. & A. Ry. Co. (Mich.)* 63 N. W. 420.

Held, that the rendering of the judgment against the plaintiff entitles the defendant to the immediate possession of the property in the hands of the garnishee, unless the court order the garnishee to retain it, and that the certiorari operates as a supersedeas only from the date of granting it. *Seamans v. King*, 79 Ga. 611, 5 S. E. 53.

⁵⁴ *Erickson v. Duluth, S. S. & A. Ry. Co. (Mich.)* 63 N. W. 420; *Treat v. Dunham*, 74 Mich. 114, 41 N. W. 876; *Dolby v. Tingley*, 9 Neb. 412, 2 N. W. 866; *Kennedy v. Tiernay*, 14 R. I. 528; *Puff v. Hutcher*, 78 Ky. 146; *Harrison v. Trader*, 29 Ark. 85; *Danforth v. Carter*, 4 Iowa, 230; *Drake*, *Attachm.* § 427.

As to what bond is necessary to preserve the lien, see *Lehnoff v. Fisher*, 32 Neb. 107, 48 N. W. 821.

The appeal must be perfected within the prescribed time. *Peterson v. Hays*, 85 Iowa, 14, 51 N. W. 1143.

⁵⁵ See ante, § 2.

⁵⁶ *Dolby v. Tingley*, 9 Neb. 412, 2 N. W. 866; *Chase v. Foster*, 9 Iowa, 429; *Kennedy v. Tiernay*, 14 R. I. 528; *Boynton v. Foster*, 7 Metc. (Mass.) 415; *Webster v. City of Lowell*, 2 Allen, 123. See, also, ante, § 326.

It has been said that this statement does not apply to proceedings by writ of error or certiorari in which the appellate court does not try the case de novo, but merely reviews and corrects the errors committed by the trial court. In order to have errors in the garnishment proceedings reviewed in such cases, probably an independent writ should be issued to bring them up. *Withington v.*

rendered discharging the garnishee before the appeal was taken, in which case some of the decisions indicate that the plaintiff must take a separate appeal in the garnishment suit if he wishes to preserve his lien.⁵⁷ The appeal of the main action ousts the lower court of further jurisdiction of the garnishment suit, and any order afterwards made by the lower court therein is simply void, and no appeal need be taken from it.⁵⁸ It has been held that the garnishee is bound to take notice that an appeal has been taken from the judgment for the defendant,⁵⁹ and of course he must take notice of the law giving the right to appeal,⁶⁰ and payment by him to the defendant after he has notice of the plaintiff's intention to appeal will not

Southworth, 26 Mich. 381; *Welch v. Pittsburgh, Ft. W. & C. Ry. Co.*, 11 Ohio St. 569. Contra, *Kennedy v. Tiernay*, 14 R. I. 528.

When one writ of error was issued, and the defendant and garnishee joined in the assignments of error, it was held that the whole case might be considered by the supreme court. *Hudson v. McConnel*, 12 Ill. 170.

IN MICHIGAN it was held that the statutes indicated an intention on the part of the legislature that the garnishment should not follow the main action when it was appealed. *Erickson v. Duluth, S. S. & A. Ry. Co.* (Mich.) 63 N. W. 420. The legislature then in session immediately enacted that the garnishment shall follow the suit. Pub. Acts Mich. 1895, No. 252.

⁵⁷ *Brown v. Tuppeny*, 24 Kan. 29; *Dolby v. Tingley*, 9 Neb. 412, 2 N. W. 866. Contra, *Kennedy v. Tiernay*, 14 R. I. 528; *Erickson v. Duluth, S. S. & A. Ry. Co.* (Mich.) 63 N. W. 420.

⁵⁸ *Boynton v. Foster*, 7 Metc. (Mass.) 415; *Erickson v. Duluth, S. S. & A. Ry. Co.* (Mich.) 63 N. W. 420.

Held, that the justice of the peace from whom the appeal is taken cannot allow an indorsement of return by the officer on the garnishment writ after the appeal is taken. *Vail v. Rowell*, 53 Vt. 109.

⁵⁹ *Puff v. Hatcher*, 78 Ky. 146; *Chase v. Foster*, 9 Iowa, 429.

⁶⁰ *Erickson v. Duluth, S. S. & A. Ry. Co.* (Mich.) 63 N. W. 420.

relieve him from liability to the plaintiff;⁶¹ and it is doubtful, to say the least, whether any payment before an order of court is made discharging the garnishee will afford him any protection against the plaintiff if the latter does finally succeed in recovering a judgment in the main action.⁶²

The Record.

§ 408. The record is the written history of the proceedings in the cause, kept as a memorial thereof, and, when completed by the entry of final judgment, was at common law called the "judgment roll."⁶³ Unless other matters are incorporated into it by bill of exceptions, it consists only of the process, pleadings, verdict, and judgment.⁶⁴ In the absence of bill of exceptions it is held that neither the judgment in the main action,⁶⁵ the interrogatories and answers by the garnishee in the garnishment suit,⁶⁶ nor the garnishee's

⁶¹ *Danforth v. Rupert*, 11 Iowa, 547, 551; *Drake*, Attachm. § 427.

⁶² *Harrison v. Trader*, 29 Ark. 85. See ante, § 382.

⁶³ *Steph. Pl. (Tyler's Ed.)* 61, 116, 142; 3 Bl. Comm. 24.

⁶⁴ 3 *Enc. Pl. & Prac.* 378.

⁶⁵ *Gunn v. Howell*, 27 Ala. 663; *Faulks v. Heard*, 31 Ala. 516; *Gould v. Meyer*, 36 Ala. 565; *Curry v. Woodward*, 44 Ala. 305.

The court will not dismiss the case because the record does not contain the final judgment in the main action. "Where the record contains everything necessary for this court to pass upon the errors complained of in that regard, it is sufficient to challenge our attention, even although the record does not contain the final judgment in the original case." *Bradley v. Byerley* (Kan. App.) 42 Pac. 930.

⁶⁶ *Sinard v. Gleason*, 19 Iowa, 165; *Brainard v. Simmons*, 58 Iowa, 464, 9 N. W. 382, and 12 N. W. 484, *Rothrock, J.*, dissenting. *Contra, Rankin v. Simonds*, 27 Ill. 352; *Perea v. Colorado Nat. Bank* (N. M.) 27 Pac. 322.

formal answer, unless considered as in the nature of a pleading,⁶⁷ are any part of the record, except when incorporated into or clearly identified by the judgment against the garnishee.⁶⁸ It has been held that unless the record show all facts necessary to confer jurisdiction on the court rendering the judgment it cannot be sustained on appeal,⁶⁹ but, those facts appearing, it will be sufficient,⁷⁰ and the court will always adopt such a construction of the record as will make it consistent and regular, if possible,⁷¹ and, rath-

⁶⁷ *Brainard v. Simmons*, 58 Iowa, 464, 9 N. W. 382, and 12 N. W. 484; *Lovejoy v. Lee*, 35 Vt. 430. See ante, § 288.

The supreme court of Alabama seems to have taken the inconsistent position that the answer is neither pleading nor evidence. See ante, § 289; *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

⁶⁸ *Corbitt v. Pynes*, 45 Ala. 258; *Curry v. Woodward*, 44 Ala. 305.

"The answer of a garnishee, though in writing, is not part of the record, unless made so by bill of exceptions, or recitals in the judgment entry. *Gaines v. Beirne*, 3 Ala. 114; *Bostwick v. Beach*, 18 Ala. 80; *Saunders v. Camp*, 6 Ala. 73. If it is in writing, and is identified by the judgment entry, it will be considered part of the record. *Jones v. Howell*, 16 Ala. 695. A recital in the judgment entry that the garnishee has filed an answer will authorize this court to look to an answer, found in the transcript, as a part of the record. *Price v. Thompson*, 11 Ala. 875; *Fortune v. Bank*, 4 Ala. 385; *Stubblefield v. Hagerty*, 1 Ala. 38. But if there is a conflict between the recitals of the judgment entry of what the answer contains and the answer found in the transcript, verity will be accorded to the recitals of the judgment entry. *Gaines v. Beirne*, supra; *Saunders v. Camp*, supra." *Decatur, C. & N. O. Ry. Co. v. Crass*, 97 Ala. 519, 12 South. 43.

⁶⁹ *Miller v. Wilson*, 86 Tenn. 495, 7 S. W. 638; *Pickler v. Rainey*, 4 Heisk. (Tenn.) 335. Contra, *Moore v. Reeves*, 47 Iowa, 30.

⁷⁰ *Gunn v. Howell*, 27 Ala. 663.

⁷¹ *Prout v. Grout*, 72 Ill. 457; *Moore v. Reeves*, 47 Iowa, 30; *Prestwood v. Tillis*, 96 Ala. 181, 11 South. 283.

er than reverse a judgment or dismiss an appeal when the record is imperfect or incomplete because of omission or formal error, the court will, upon motion, award certiorari to bring up the record of the lower court,⁷² or without action remand the case to the lower court for correction,⁷³ or the supreme court will itself make the correction if the record furnishes sufficient data.⁷⁴

Action of the Appellate Court.

§ 409. When the cause is tried *de novo* upon appeal, the action of the lower court is unimportant, except so far as affecting the question of jurisdiction.⁷⁵ The appellate court follows its own practice,⁷⁶ but tries the same issues, and with the same effect, as the parties were entitled to in the lower court.⁷⁷ In a court of review merely no other objections⁷⁸ to the pleadings or proceedings in the trial court will be considered unless the error is shown by the record sent

⁷² Blair v. Rhodes, 5 Ala. 648; Curry v. Woodward, 44 Ala. 305; Cairo & St. L. Ry. Co. v. Hindman, 85 Ill. 521.

⁷³ Randolph v. Little, 62 Ala. 396.

A merely formal correction may be made by the lower court after it has lost control of the case by appeal. Birmingham Nat. Bank v. Mayer (Ala.) 16 South. 520.

⁷⁴ Blair v. Rhodes, 5 Ala. 648; Randolph v. Little, 62 Ala. 396.

⁷⁵ Miller v. Wilson, 86 Tenn. 495, 7 S. W. 638.

The disclosure of the garnishee in the lower court may be put in evidence against him on the trial in the appellate court. Newell v. Blair, 7 Mich. 103.

⁷⁶ Newell v. Blair, 7 Mich. 103.

⁷⁷ Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317.

⁷⁸ Jurisdiction may be questioned at any stage of the case. Coleman's Appeal, 75 Pa. St. 441.

up,⁷⁹ is prejudicial,⁸⁰ is claimed by exception taken in the trial court,⁸¹ is clearly within the assignments of error,⁸² and is relied upon by counsel in their brief.⁸³ A court of review will never disturb a judgment rendered by the trial court when the evidence upon which the trial court acted is not all before the court of review,⁸⁴ nor when there was any evidence to sup-

⁷⁹ *Richards v. Smith*, 9 Gray (Mass.) 315; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55 (Gil. 44); *Kimball v. Macomber*, 50 Mich. 362, 15 N. W. 511; *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Brainard v. Shannon*, 60 Me. 342.

Error will never be presumed. *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525.

⁸⁰ *Arenz v. Reihle*, 1 Scam. (Ill.) 340; *Houston v. Walcott & Co.*, 1 Iowa, 86; *Buckey v. Phenicie* (Colo. App.) 35 Pac. 277.

⁸¹ *Moore v. Hill*, 87 Ga. 91, 13 S. E. 259; *John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 90 Wis. 464, 63 N. W. 1018; *Eason v. Gester*, 31 Iowa, 475; *Robison v. Saunders, Kibben & Co.*, 14 Iowa, 539; *Smith v. Chapman*, 6 Port. (Ala.) 365; *Daniel v. Hopper*, 6 Ala. 296.

It has also been held that the trial court must have been given opportunity to correct the error on motion to set aside judgment on the ground of it. *Robison v. Saunders, Kibben & Co.*, 14 Iowa, 539. *Contra*, *Mears v. Adreon*, 31 Md. 229. Compare *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

⁸² *Sherwood v. Stevenson*, 25 Conn. 431, 437; *Falconer v. Head*, 31 Ala. 513.

⁸³ *Black v. Dawson*, 82 Mich. 485, 46 N. W. 793.

In the above case counsel for the garnishee, just before the hearing, filed an exhaustive supplementary brief, resting on grounds not urged in the original brief, but the court refused to allow such advantage to be taken, and considered only the original brief.

⁸⁴ *Prout v. Grout*, 72 Ill. 456; *Kimball v. Macomber*, 50 Mich. 362, 15 N. W. 511; *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525; *Brown v. Ridgway*, 10 Pa. St. 42; *Gidding's Appeal*, 81 Pa. St. 72; *Wilson v. Albright*, 2 G. Greene (Iowa) 125; *Stockton v. City of Burlington*,

port the judgment rendered,⁸⁵ nor to relieve a party who has not appealed,⁸⁶ nor because of errors not objected to in the trial court, but first relied upon in the court of review,⁸⁷ nor when the judgment appealed from is correct though rendered upon an incorrect view of the law,⁸⁸ nor because of any ruling of the trial court upon matters lying within its peculiar discretion, unless that discretion has been abused.⁸⁹ The court of review will consider the case as standing in the same condition as it stood in the trial court.⁹⁰ If the court of review finds no prejudicial error, the judgment below will be affirmed; and, if such error is found, and the record clearly indicates what judgment should be rendered, the appellate court may enter such

4 G. Greene (Iowa) 84; Sheppard & Co. v. Downing, 14 Iowa, 597; Duncan v. Sangamo Fire Ins. Co., 35 Iowa, 20.

⁸⁵ Kauffman v. Jacobs, 49 Iowa, 432; Buckham v. Wolf, 58 Iowa, 601, 12 N. W. 623; Spencer v. Moran, 80 Iowa, 374, 45 N. W. 902; Farrington v. Sexton, 43 Mich. 454, 5 N. W. 654; Weibler v. Ford (Minn.) 63 N. W. 1075; Field v. Malone, 102 Ind. 251, 1 N. E. 507; Parker v. Page, 38 Cal. 522.

When the record purports to be full, and contains nothing to authorize the judgment rendered, it will be reversed. Kiggins v. Woodke, 78 Iowa, 34, 34 N. W. 789; Miller v. Wilson, 86 Tenn. 495, 7 S. W. 638.

⁸⁶ Ford v. Detroit Dry-Dock Co., 50 Mich. 358, 15 N. W. 509.

⁸⁷ Banning v. Sibley, 3 Minn. 389 (Gil. 283, 294); Fitzsimmons v. Carroll, 128 Mass. 401; Groome v. Lewis, 23 Md. 137, 87 Am. Dec. 563.

⁸⁸ Bigalow v. Barre, 30 Mich. 1; Field v. Malone, 102 Ind. 251, 1 N. E. 507; Smith v. Brown, 5 Cal. 118; Everett v. Westmoreland, 92 Ga. 670, 19 S. E. 37; Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369.

⁸⁹ Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139. For other decisions on this proposition, see ante, §§ 309, 310, 386, 397.

⁹⁰ Kennedy v. McLellan, 76 Mich. 598, 43 N. W. 641.

judgment without remanding the case,⁹¹ or remand it with orders to the lower court to enter judgment in accordance with the view of the appellate court. Otherwise the judgment will be reversed, and the case remanded to the lower court for a new trial.⁹²

⁹¹ *Donnelly v. O'Connor*, 22 Minn. 309; *Craft v. Louisville & N. Ry. Co.*, 93 Ala. 22, 9 South. 328.

⁹² *Chicago, St. L. & P. Ry. Co. v. Meyer (Ind.)* 19 N. E. 320.

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